

PREHEARING CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification for) Docket No.
the Avenal Energy Project) 08-AFC-1
)
)
_____)

CALIFORNIA ENERGY COMMISSION
HEARING ROOM A
1516 NINTH STREET
SACRAMENTO, CALIFORNIA 95814

TUESDAY, JUNE 30, 2009

9:00 A.M.

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PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Jeffrey D. Byron, Presiding Member

Karen Douglas, Associate Member

HEARING OFFICER AND ADVISORS

Gary Fay, Hearing Officer

Kristy Chew, Advisor

Laurie Tenhope, Advisor (via teleconference)

STAFF AND CONSULTANTS PRESENT

Lisa DeCarlo, Senior Staff Counsel

Joseph Douglas, Project Manager

Rosemary Avalos

Alvin Greenberg, Consultant (via teleconference)

Aspen Environmental

APPLICANT

Jane E. Luckhardt, Attorney

Downey Brand Attorneys, LLP

Jim Rexroad, Vice President

Avenal Power Center, LLC

Gary Rubenstein

Sierra Research

INTERVENORS

Loulena A. Miles, Attorney (via teleconference)

Adams, Broadwell, Joseph and Cardozo
representing California Unions for Reliable Energy

Ingrid Brostrom (via teleconference)

Center on Race, Poverty and Environment

INTERVENORS

Gerald Vinnard (via teleconference)
Sierra Club, Tehipite Chapter

Rob Simpson (via teleconference)

ALSO PRESENT

Anna Martinez (via teleconference)
Green Action

Ray Leon (via teleconference)
Latino Policy Project

Robert Dowds (via teleconference)

Steve McClary (via teleconference)
MRW

Marc Renson (via teleconference)
Pacific Gas and Electric Company

Jim Swaney (via teleconference)
San Joaquin Valley Air Pollution Control District

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1 P R O C E E D I N G S

2 9:00 a.m.

3 HEARING OFFICER FAY: Good morning.

4 This is a prehearing conference being held at the
5 California Energy Commission for the Avenal Energy
6 Project.

7 I am Gary Fay, the Hearing Officer on
8 this case. And to my left is the Presiding
9 Commissioner on the case, Jeff Byron. And to his
10 left is his assistant, Kristy Chew. And to my
11 right is the Chairman of the Energy Commission,
12 who is the second member on this case, Karen
13 Douglas.

14 And what I would like to do is begin.
15 I'll just note that this hearing was noticed in
16 detail on June 15th. But on April 24th, the
17 Committee had sent out a scheduling order that
18 detailed the remaining events in the case,
19 including this prehearing conference and the
20 filing of direct testimony and rebuttal testimony
21 and when the evidentiary hearings would take
22 place.

23 And I'd also like to mention, in terms
24 of the phone protocol, we do have a phone line
25 hookup. I'd like people to, as we always ask,

1 please identify yourself before you begin speaking
2 so that everybody, including the court reporter,
3 knows exactly who is speaking at that moment, and
4 as a courtesy to the people on the phone line.

5 And the people on the phone line, just
6 wait until I call on you. I will be asking if
7 there are any parties on the line and if they have
8 any comments on a particular matter at a
9 particular time.

10 Then at the end of the hearing we will
11 take public comment, so if you are not an
12 intervenor in this case or a party, you can wait
13 until we ask for public comment, and allow anybody
14 to comment whether they're here in the room with
15 us now, or on the phone line.

16 So I would like to begin by taking what
17 we call appearances. And I've introduced the
18 Committee. Is there a representative from the
19 Public Adviser's Office here? Okay, I don't see
20 anybody.

21 The Public Adviser is available to
22 assist other parties in the case, usually aside
23 from the staff and applicant, and anybody who's
24 not represented in the case. Or even if they are,
25 can avail themselves of the services of the Public

1 Adviser's Office. And each notice we put out has
2 that phone number; and it's on the Commission
3 website. If you need help participating in the
4 case, contact the Public Adviser.

5 And so we'll begin by taking appearances
6 for the applicant.

7 MS. LUCKHARDT: Good morning. My name
8 is Jane Luckhardt from Downey, Brand, project
9 counsel. And with me to my right here today is
10 Jim Rexroad from Avenal Power Center.

11 HEARING OFFICER FAY: And the staff.

12 MS. DeCARLO: Good morning. Lisa
13 DeCarlo, Energy Commission Staff Counsel. And to
14 my right is Joseph Douglas, Energy Commission
15 Project Manager for the Avenal project.

16 HEARING OFFICER FAY: Thank you. Is
17 there a representative of the Intervenor,
18 California Unions for Reliable Energy on the line?

19 Okay, I don't hear any response. They
20 are an intervenor in this case. How about
21 Intervenor Center on Race, Poverty and the
22 Environment?

23 MS. BROSTROM: Again, Ingrid Brostrom on
24 the line.

25 HEARING OFFICER FAY: All right.

1 Ingrid, would you spell your name for the court
2 reporter?

3 MS. BROSTROM: Yes. It's I-n-g-r-i-d
4 Brostrom, B-r-o-s-t-r-o-m.

5 HEARING OFFICER FAY: Thank you. And
6 what is the short phrase you use for your
7 organization, CRPE?

8 MS. BROSTROM: CRPE, yes.

9 HEARING OFFICER FAY: Thank you. And
10 how about the Sierra Club local chapter, is there
11 a representative there?

12 I hear no response. Oh, Gerald Vinnard?
13 Is he on the line? Okay.

14 MR. VINNARD: Let's try -- can you hear
15 me now?

16 HEARING OFFICER FAY: I can hear you
17 now, yes.

18 MR. VINNARD: Okay, I'm sorry. Yes, I'm
19 here for the Tehipite Chapter of the Sierra Club.
20 My last name is spelled V-, as in victory,
21 -i-n-n-a-r-d.

22 HEARING OFFICER FAY: Okay, thank you.
23 And that's pronounced Tehipite?

24 MR. VINNARD: Tehipite, that's correct.

25 HEARING OFFICER FAY: Thank you. And

1 then Intervenor, Rob Simpson?

2 MR. SIMPSON: Good morning, this is Rob
3 Simpson, calling from sunny Hayward.

4 HEARING OFFICER FAY: Thank you, Mr.
5 Simpson. Are there any governmental agencies
6 represented on the line?

7 MR. SWANEY: Hello. This is Jim Swaney
8 with the San Joaquin Valley Air Pollution Control
9 District. And that is S-w-a-n-e-y.

10 HEARING OFFICER FAY: And the first name
11 is?

12 MR. SWANEY: Jim, J-i-m.

13 HEARING OFFICER FAY: Okay, thank you.
14 Is there a representative from the city of Avenal
15 on the line? I hear nobody. Any other elected
16 officials participating in this?

17 And how about other commenters who are
18 not intervenors in this case? Mark Renson?

19 MR. RENSON: R-e-n-s-o-n. I don't
20 believe I will be making any comments.

21 HEARING OFFICER FAY: Okay.

22 MR. RENSON: And I'm with PG&E.

23 HEARING OFFICER FAY: Okay. Thank you.

24 And how about Mr. McClary, Steve McClary? Are you
25 on the line?

1 MS. DeCARLO: Mr. McClary is with MRW.

2 HEARING OFFICER FAY: Oh, I see.

3 MS. DeCARLO: I believe he's probably
4 just listening in.

5 HEARING OFFICER FAY: All right.

6 MR. McCLARY: That's correct.

7 HEARING OFFICER FAY: Okay. All right.

8 Thank you all very much for those preliminary
9 matters.

10 Just by way of background, we wanted to
11 call your attention to the prehearing conference
12 statement, itself. That the purposes of this
13 event are to assess the parties' readiness for
14 hearings; to clarify areas of agreement or
15 dispute; to identify witnesses and exhibits; to
16 determine upon which areas parties desire to
17 cross-examine witnesses from other parties; and to
18 discuss associated procedural items.

19 We've required in our notice that the
20 parties wishing to participate file testimony and
21 then rebuttal testimony. And then as of June
22 22nd, file prehearing conference statements.

23 We had timely prehearing conference
24 statements filed by applicant Avenal Power and the
25 California Energy Commission Staff. And I believe

1 Rob Simpson.

2 The prehearing conference statement
3 filed jointly by the Tehipite Chapter of the
4 Sierra Club and the Center on Race, Poverty and
5 the Environment, CRPE, was filed late, June 26th,
6 and the Committee received no request for leave to
7 file late, nor is there a showing of good cause in
8 the prehearing conference statement.

9 Intervenor CURE did not file a
10 prehearing conference statement, and therefore we
11 presume that they do not wish to participate in
12 this conference or cross-examine witnesses at the
13 evidentiary hearings.

14 MS. MILES: Hi. This is Loulena from
15 CURE. And that is correct at this point, although
16 we are monitoring the proceedings.

17 HEARING OFFICER FAY: Okay.

18 PRESIDING MEMBER BYRON: Would you get
19 her last name --

20 HEARING OFFICER FAY: And your last
21 name, Loulena?

22 MS. MILES: This is Loulena Miles.

23 HEARING OFFICER FAY: Thank you for
24 clarifying that.

25 The opening testimony was filed as per

1 the Committee's scheduling order, was filed on
2 June 8th by the applicant. Staff had previously
3 filed its FSA on June 4th. And we received no
4 rebuttal testimony except that filed by Intervenor
5 Rob Simpson.

6 Now, today's agenda is really in three
7 parts. We need to discuss various procedural
8 matters and motions filed by the parties first.
9 And we may take a brief recess after that, and
10 address those matters.

11 Then we need, second, to deal with the
12 subject matters of the evidentiary hearing in
13 terms of what kind of time is necessary for direct
14 and the testimony on cross-examination.

15 And then finally we want to reserve time
16 for public comment.

17 So I'll get right into the procedural
18 matters. The first is that on June 8th Rob
19 Simpson filed a petition to intervene. And that
20 included a request to stay the proceedings.

21 The Committee granted Mr. Simpson's
22 petition to intervene, but denied the request to
23 stay. And that was issued on June 11th. Mr.
24 Simpson appealed that denial on June 15th. And
25 the applicant, Avenal, responded on June 24th.

1 I'd just like to summarize the matters
2 briefly. Because that is an appeal from the
3 Committee's order, the appeal is taken up to the
4 full Commission. They are considering it and will
5 reach a decision by late July.

6 Unless the Commission reverses the
7 Committee's order, the Committee order stands and
8 the schedule will proceed as per Committee order.
9 Any questions regarding this matter should be
10 addressed to Jonathan Blees, Assistant Chief
11 Counsel. Mr. Blees is representing the full
12 Commission on this matter. His email is
13 jblees@energy.state.ca.us. So we're not
14 entertaining discussion on that matter today.
15 That is being handled elsewhere.

16 However, there are still matters pending
17 before the Committee. In chronological order, the
18 first is the motion by the applicant, Avenal, to
19 strike the rebuttal testimony filed by Rob
20 Simpson.

21 And so we'll open with -- I'll note that
22 applicant filed its motion to strike on June 18th,
23 but we did want to entertain oral argument on
24 that. So, Ms. Luckhardt, do you have anything to
25 add to your file?

1 MS. LUCKHARDT: I think we covered it
2 fairly well on the filing. Just to summarize, a
3 lot of the information that is contained in the
4 extensive exhibits filed by Intervenor Rob Simpson
5 addressed a different siting case. They addressed
6 the siting case of the Russell City Power Plant
7 siting case that has been before this Commission.

8 Other things that they addressed are a
9 PM2.5 rulemaking that is before the Bay Area
10 District, or before EPA. And there are a whole
11 set of documents in here that we believe truly are
12 not rebuttal testimony. They do not address this
13 specific project. They were crafted and written,
14 and in many instances were written as comments on
15 other documents, or comments on the Russell City
16 proceeding, comments to the Bay Area District on
17 their permitting process, comments to EPA on a
18 rulemaking process. None of which are focused on
19 this project, this project's impacts in this air
20 basin, or the issues that are presented specific
21 to an individual siting case, and that being the
22 Avenal siting case, not the Russell City siting
23 case.

24 And many of the comment letters that are
25 attached are comment letters. They were not

1 drafted initially as testimony. They were simply
2 comment.

3 And I'm happy to sit down and go through
4 them one-by-one; we did that in our filing. But
5 we believe, first of all, that it is not
6 appropriate testimony in the first instance for
7 this proceeding in this case. And second, that it
8 is not rebuttal testimony to our information or
9 our filing. It's not rebuttal testimony to this
10 specific project.

11 And so we believe that it does not
12 qualify as testimony, in the first instance, or as
13 rebuttal testimony.

14 And like I said, I'm happy to go through
15 and we can take them one-by-one, if you like.

16 HEARING OFFICER FAY: Looks to me like
17 there are 26 documents that were filed on June
18 15th by Mr. Simpson. Does that agree with your
19 calculations, Ms. Luckhardt?

20 MS. LUCKHARDT: There are 26 letters in
21 the alphabet, --

22 HEARING OFFICER FAY: Yes.

23 MS. LUCKHARDT: -- and I've gone up to
24 exhibit DD, some of which I think there may have
25 been one that is a duplicate of another. So, I'm

1 looking at something like 30.

2 HEARING OFFICER FAY: Thirty? Okay.

3 Mr. Simpson, can you tell us how many
4 documents you filed in that filing?

5 MR. SIMPSON: Sure, I could. Let's see.

6 HEARING OFFICER FAY: We just want to be
7 sure we've actually got all of them before us.

8 MR. SIMPSON: Well, maybe I'm -- have a
9 few minutes?

10 HEARING OFFICER FAY: Well, we will get
11 back to you on that. If you could identify for
12 us.

13 Anything further, Ms. Luckhardt, unless
14 we have to go back and go through each document?

15 MS. LUCKHARDT: Yeah, I think it's
16 pretty well summarized in our filing, and I think
17 that -- but I am happy to go through them one-by-
18 one. We just feel that it isn't appropriate
19 testimony for this proceeding.

20 HEARING OFFICER FAY: Okay. Does the
21 staff have any reaction, Ms. DeCarlo?

22 MS. DeCARLO: We agree with the
23 applicant's objection, particularly with regard to
24 the comment letters filed in the Russell City
25 proceeding. That involves an entirely different

1 project with an entirely different air district.

2 There's no indication that the parties
3 that commented in that proceeding, many of them --
4 any of them are concerned about issues regarding
5 this project. So therefore we would object to the
6 inclusion of any of those as testimony, or even as
7 public comment in this proceeding.

8 With regard to their several other
9 exhibits that are scientific studies, there's no
10 indication of how those respond to anything filed
11 by the staff or the applicant in this proceeding.
12 There's no identification of any expert witnesses
13 that are qualified to testify to these scientific
14 studies. So, we would object, at least at this
15 date, prior to a showing of a qualified sponsor of
16 that testimony, to inclusion of those exhibits and
17 testimony, as well.

18 HEARING OFFICER FAY: Have you reviewed
19 the documents for relevance in this case?

20 MS. DeCARLO: We have not had a chance
21 to thoroughly go through these, at least I have
22 not, with my expert witnesses. But we can
23 certainly do that at a later date.

24 I have the titles here if you want kind
25 of an indication of what the scientific studies --

1 HEARING OFFICER FAY: Well, we have
2 that.

3 MS. DeCARLO: -- purport to represent.

4 MS. LUCKHARDT: The only one that we can
5 find that even has a relation to the project, I
6 think, is W, which we didn't see as being rebuttal
7 testimony. But it's the only thing that even says
8 Avenal on it.

9 PRESIDING MEMBER BYRON: It's also an
10 undated document.

11 HEARING OFFICER FAY: All right, do any
12 of the other parties, aside from Mr. Simpson, wish
13 to weigh in on this matter? This is your
14 opportunity to speak up.

15 MR. VINNARD: This is Gerald Vinnard.
16 We don't have anything to say.

17 HEARING OFFICER FAY: Okay. And I'm not
18 hearing from anybody else. So I'd like to move to
19 Mr. Simpson and let him argue in support of his
20 documents filed on June 15th. Mr. Simpson.

21 MR. SIMPSON: Thank you. There are 30
22 attachments to the filing. And the reply in
23 writing with the time given between the FSA and
24 the new information that came out in the FSA
25 regarding the greenhouse gas considerations, the

1 new reports.

2 I'm happy to change that testimony to a
3 witness list and call any of the people that have
4 commented in those attachments if that would be a
5 better way to handle it for the Commission.

6 HEARING OFFICER FAY: Now, I guess
7 you're assuming that the documents you filed
8 constitute the filing of testimony, is that
9 correct?

10 MR. SIMPSON: That is my testimony, yes.

11 HEARING OFFICER FAY: All right. And
12 just exploring some of this, are you asserting
13 that all these are relevant to the Avenal case?

14 MR. SIMPSON: Yes.

15 HEARING OFFICER FAY: A great number of
16 them seem to be limited to a different air
17 district and a different power plant project. How
18 do you tie that in?

19 MR. SIMPSON: That is correct, a lot of
20 them are pursuant to other sitings which have many
21 of the same rules. We're working under the same
22 Clean Air Act; you've got the same set of rules,
23 within the Commission. The air districts have
24 similar rules.

25 So this power plant siting doesn't

1 necessarily need to be reinvented with each
2 proceeding. There is information that the
3 applicant and the Commission that all parties will
4 draw from relevant information from other
5 proceedings.

6 HEARING OFFICER FAY: You understand
7 that the San Joaquin Valley Air Pollution Control
8 District has its own rules that apply to power
9 plants, correct?

10 MR. SIMPSON: Yeah, but I understand
11 that they're all based upon the Clean Air Act.

12 HEARING OFFICER FAY: That's true, but
13 that's the jurisdiction that we're in. And the
14 technology we're examining is the Avenal Power
15 Plant.

16 So what I'm asking you is why should we
17 rely on something regarding another air district,
18 a different jurisdiction, and in the case of
19 documents related to the Russell City Energy
20 Project, a completely different technology, power
21 plant and site.

22 MR. SIMPSON: Well, again, the federal
23 rules don't change for each siting. The state
24 rules don't change for each siting. The local
25 district rules may change. And to the extent that

1 the San Joaquin rules are different than the Bay
2 Area rules, I'm sure the San Joaquin rules will
3 prevail.

4 But I haven't heard anything that says
5 any of this is not consistent with state, federal
6 or local rules.

7 HEARING OFFICER FAY: Okay. Do you want
8 to describe your filing Avenal-W regarding
9 interpollutant trade, a three-page document,
10 undated.

11 MR. SIMPSON: Sure, let me pull it up
12 here. Oh, this is the trading of the SOx credits
13 with the PM2.5, or PM10 credits?

14 HEARING OFFICER FAY: Um-hum.

15 MR. SIMPSON: And how that's
16 inconsistent with the ruling that the EPA's
17 expressing in another proceeding through the
18 federal action.

19 HEARING OFFICER FAY: Okay. Who
20 authored that document?

21 MR. SIMPSON: I believe this is Bob
22 Sarvey.

23 HEARING OFFICER FAY: Okay. Mr.
24 Sarvey's not in this case, so you're trying to
25 introduce a three-page statement by Bob Sarvey

1 about the Avenal case, is that correct?

2 MR. SIMPSON: No. I'm incorporating Mr.
3 Sarvey's statement into my testimony. And to the
4 extent they're rejected as my testimony I'll be
5 happy to call Mr. Sarvey to testify.

6 HEARING OFFICER FAY: All right. Are
7 you prepared to testify in support of exhibit
8 Avenal-W?

9 MR. SIMPSON: Sure.

10 HEARING OFFICER FAY: Okay.

11 PRESIDING MEMBER BYRON: Do we have a
12 copy of that document?

13 HEARING OFFICER FAY: We'll go off the
14 record for a moment.

15 (Off the record.)

16 HEARING OFFICER FAY: Mr. Simpson, we
17 have the document in front of us now. And the
18 Committee will evaluate that before ruling on the
19 applicant's motion to exclude all your testimony.

20 Is there anything you'd like to say
21 about any of the other documents you filed on June
22 the 15th?

23 MR. SIMPSON: Sure. I'd like to thank
24 the Commission for the opportunity to participate
25 in this proceeding. And I'd like to apologize if

1 any of my documents are not of the caliber that
2 you're used to seeing. I'm not an attorney; I'm a
3 private citizen trying to participate in these
4 proceedings.

5 HEARING OFFICER FAY: Okay.

6 MR. SIMPSON: Thank you.

7 HEARING OFFICER FAY: Thank you. Mr.
8 Simpson, Commissioner Byron had the impression
9 that you represented yourself before the
10 Commission at one time as an attorney. Has that
11 occurred?

12 MR. SIMPSON: No.

13 HEARING OFFICER FAY: Okay. All right.
14 Thank you for your response on that motion.

15 Are there any other comments, arguments
16 or anything regarding the applicant's motion to
17 strike the rebuttal testimony of Rob Simpson filed
18 on June 15th?

19 MS. BROSTROM: Yes. This is Ingrid
20 Brostrom, CRPE. Can you hear me?

21 HEARING OFFICER FAY: Yes.

22 MS. BROSTROM: Okay, thank you. I just
23 wanted to point out that the applicant's main
24 argument appears to be that the word Avenal, or,
25 you know, the specific discussion of Avenal must

1 appear in those documents.

2 And, you know, I agree with Rob Simpson
3 on this, in that, you know, to the extent that
4 these documents present generalized information on
5 power plants, even in other permitting decisions,
6 you know, there is relative information about.
7 And to the extent that it's generalized
8 information those should be admitted.

9 I don't think that the specific mention
10 of Avenal Power Plant would begin with no general
11 air quality concerns should be, you know, these
12 surveys, from precluding those documents. That's
13 all.

14 HEARING OFFICER FAY: Okay. Any other
15 responses on this motion?

16 MR. SIMPSON: I'm Rob Simpson. I'd like
17 to point out that if we can get a revised
18 scheduling order I'll be happy to revise that
19 testimony. Thank you.

20 HEARING OFFICER FAY: Yes, we note Mr.
21 Simpson sought a revised schedule in his initial
22 filing, at the same time that he appealed the
23 Committee's denial of his extension or motion to
24 stay.

25 All right, this is the last call on the

1 Avenal's motion to strike Simpson's testimony.

2 Anything further?

3 MS. LUCKHARDT: I guess I just feel,
4 based upon the comments from CRPE just a moment
5 ago that, you know, really in looking at this
6 information, it's not simply generalized
7 information.

8 These are comment letters. I mean the
9 first one, exhibit A, is an email from a product
10 representative on the Russell City project. And
11 with some fuel tech information.

12 Exhibit B is a comment letter from the
13 Alameda County Public Health Department that was
14 sent in to the air district, the Bay Area
15 District, having to do with specific impacts on
16 that area.

17 Exhibit C is an email sent to the air
18 district with comments on the Russell City
19 project. There is a statement in Exhibit D from a
20 professor at Chabot College that has to do with
21 environmental justice issues and the combined
22 impacts of various different pollution sources and
23 other risks to the population in the Hayward area.

24 Exhibit C is a letter from the Audubon
25 California to the Bay Area District dealing with

1 the Hayward shoreline. And some other issues.

2 There are comments, I mean there's a lot
3 of that in here. There are many many many comment
4 letters and emails that went to the air district
5 from various different parties. These are
6 comments; this wasn't in its initial filing, sworn
7 testimony. These are comment letters to an air
8 district.

9 They weren't, when they were initially
10 proposed to be, testimony, let alone to be used,
11 transferred from one case to another case, and
12 then to become testimony in that proceeding. It
13 is completely inappropriate to have this stuff
14 come in to the Avenal case. And have it be taken
15 in as testimony in this case.

16 Some of this stuff includes some of the
17 comments and information, I think, that Mr.
18 Simpson filed, if I can get to the right one, in
19 the rulemaking proceeding at EPA.

20 Yeah, here we go. We've got comments of
21 Bob Sarvey on --

22 HEARING OFFICER FAY: Which exhibit is
23 this?

24 MS. LUCKHARDT: I'm now looking at
25 exhibit P. I'm just looking through and trying

1 not to painstakingly go through every one, but
2 we've got comments on Bob Sarvey on the PSD permit
3 for Russell City. These are Bob Sarvey's comments
4 on the PSD permit.

5 Bob Sarvey has filed testimony in
6 proceedings, and I clearly think he would
7 recognize the difference between testimony and
8 comment.

9 You know, and then we've got a bunch of
10 petitions that were filed. Objection to fossil-
11 fired power plant. That's in exhibit Q. That
12 were drafted for the Russell City project and sent
13 to the Bay Area Air Quality Management District,
14 with numerous signatures of probably, I would
15 assume, local residents.

16 We've got local chapters of the Audubon
17 Society against the Russell City project in
18 exhibit R. And it just goes on and on. Exhibit T
19 contains a petition for reconsideration in front
20 of USEPA on a rulemaking proceeding for PM2.5.

21 We've got some other filings. A filing
22 from -- or a response from USEPA to Mr. Paul Cort
23 from Earth Justice, clearly not testimony.

24 And then there are a set of kind of
25 research papers. And we don't have the folks who

1 wrote the research papers listed as witnesses.
2 And I didn't see anyone on a witness list from Mr.
3 Simpson that could sponsor such a document.

4 There are a couple studies. There's a
5 carbon dioxide air pollution mortality study that
6 would be like a public health study. Again, I
7 haven't seen anyone who could sponsor that. Or I
8 haven't seen how you would translate those studies
9 to the impacts that have been shown by modeling on
10 this project to be an impact in the area.

11 He's got something in here from Robert
12 Freehling, reasons not to replace aging natural
13 gas-fired power plants. But I haven't seen anyone
14 who is capable of testifying to something, I'm not
15 even sure where it was published or whether it was
16 published or if it just showed up on a website.

17 HEARING OFFICER FAY: Which letter is
18 that?

19 MS. LUCKHARDT: That's AA. Yeah, that's
20 AA. BB is a resolution of a specific committee of
21 Sierra Club California, the California/Nevada
22 Regional Conservation Committee.

23 There's exhibits -- CC is a comment
24 letter that was filed in this proceeding by a
25 different entity, by Pacific Environment. I'm not

1 saying that that's not an inappropriate comment;
2 it's just not appropriate as testimony on this
3 case in this proceeding.

4 And then the last thing, DD is a Sierra
5 Club comment letter on the Russell City project to
6 the Bay Area District.

7 Again, there's information here, but the
8 information either was initially intended as a
9 comment letter, not intended as testimony. It was
10 filed on another project; it was filed in a
11 different proceeding at EPA. And there are few
12 papers, some of which are published, some of which
13 may have come off a website. There's no relation
14 showing how that those are related to the Avenal
15 project, and there isn't a competent witness
16 that's been identified that could testify as to
17 what those papers would show, or how they would
18 relate to this project.

19 So that's why we object to the
20 information that was filed by Mr. Simpson. As I
21 said, the only thing that I can even find that has
22 been specifically, you know, that an attempt has
23 been made to relate it to Avenal is exhibit W.

24 HEARING OFFICER FAY: Okay, thank you.

25 MR. SIMPSON: This is Rob Simpson. I'd

1 like to respond.

2 HEARING OFFICER FAY: Okay, briefly, Mr.
3 Simpson.

4 MR. SIMPSON: Thank you. You may note
5 Mr. Freehling is identified as a witness in the
6 Sierra Club's witness list -- that my attachments
7 are rejected as my testimony, I'm happy to call
8 the people who wrote the comments or reports or
9 whatever they referred to as witnesses in this
10 proceeding.

11 And while much of this may have been
12 settled through the air district's process, the
13 air district failed to provide public notice of
14 its proceedings. The CEC Staff railed to respond
15 to my concerns about the air district's failure to
16 provide proper public notice.

17 HEARING OFFICER FAY: Okay, let me stop
18 you there. I'm sorry for interrupting you. We're
19 going to take that up as a separate matter, and
20 I'll give you a chance to talk about that. But
21 I'd just like to get closure on the motion to
22 strike the testimony you filed.

23 So, was there any last thing you'd like
24 to note on that, just on the testimony?

25 (No audible response.)

1 HEARING OFFICER FAY: Okay, we'll move
2 on then. The next matter is the one that Mr.
3 Simpson started to address. On June 29th he filed
4 a request for remedial action. And it basically
5 was a complaint against the Energy Commission
6 Staff for the way they handled, or failed to
7 handle, some of the comments that he claims to
8 have made.

9 So, I'd like to see if the staff has
10 reviewed that, and if they have any response to
11 Mr. Simpson's request of June 29th.

12 MS. DeCARLO: Yes, we have had a chance
13 to briefly review the filing. And if the
14 Committee desires I can go point-by-point to his
15 comments.

16 HEARING OFFICER FAY: I think that would
17 be helpful since unlike the prior matter where the
18 applicant did respond in writing, we don't have
19 any response from the staff. So this is your
20 opportunity in the time we have to respond.

21 MS. DeCARLO: Okay, the first comment
22 that Mr. Simpson made is that we have not complied
23 with Public Resources Code section 21091(d)(1),
24 the CEQA provision that requires that lead
25 agencies respond to comments received on draft

1 environmental impact reports and equivalent
2 documents.

3 We have responded to all the comments
4 proposed or made in the PSA proceeding, the
5 preliminary staff assessment. And those responses
6 are contained in our final staff assessment. So
7 we have fully complied with the requirements of
8 CEQA to respond to comments on a preliminary draft
9 document.

10 There is no requirement in CEQA that I
11 know of that requires a response from staff on a
12 final document. Even if there were, Mr. Simpson's
13 comments are not to the substance of our
14 environmental analysis. They go mainly towards
15 the procedure, the process that we've used,
16 noticing provisions, et cetera. And at this point
17 no requirement that we respond in writing to
18 concerns raised. However, we will address all the
19 procedural concerns that he has raised in his two
20 filings.

21 HEARING OFFICER FAY: Okay, Ms. DeCarlo,
22 between now and the final disposition of this
23 application by the Energy Commission, does Mr.
24 Simpson have any other opportunities to have input
25 in the process?

1 MS. DeCARLO: Oh, yes. I mean this is
2 only staff's portion of the analysis. Obviously
3 there is the rest of the proceeding, which is the
4 Committee's conclusions, determinations on what
5 they believe to be the environmental impact of the
6 proposed project and the compliance with LORS.

7 So there's the evidentiary hearings;
8 there's the public comment period contained in the
9 evidentiary hearings at which Mr. Simpson will be
10 able to provide his comments, raise concerns about
11 the analysis.

12 There are comments on the Presiding
13 Member's Proposed Decision, PMPD, which will be
14 the Committee's draft document. And if that
15 document is ultimately revised there will be
16 opportunity for comment on that revised document.
17 As well as comment at the Energy Commission's
18 adoption hearing with regard to the PMPD.

19 So there's a whole slew of comments that
20 can be made in the next couple of months before
21 the project is certified or not, depending upon
22 the final conclusion of the Commission.

23 HEARING OFFICER FAY: And do those
24 opportunities for public learning and public
25 comment include the specific data that he was

1 addressing? For instance, table 14 of the staff's
2 air quality analysis. I believe he's indicating
3 that should have been published. Is that going to
4 be before the public in the future?

5 MS. DeCARLO: Yeah, I don't quite
6 understand the point that he's making with that.
7 I do believe that is an air quality table that was
8 taken out of the final staff assessment. It even
9 references FSA 4.1-24 as the page number. So I'm
10 still a little confused as to the point he's
11 trying to make there.

12 However, we will have air quality staff.
13 I do believe that it will be a matter for
14 evidentiary hearing, so we'll have staff available
15 for cross-examination, questioning on that.

16 And if he does make a case that this --
17 if this information was not previously published,
18 that it should be published, the Committee has the
19 opportunity to do so in its PMPD.

20 So there's definitely opportunity to
21 address specific concern, whatever it may be --

22 HEARING OFFICER FAY: And that the PMPD,
23 or Presiding Member's Proposed Decision, would be
24 available for 30 days for public comment, as well,
25 correct?

1 MS. DeCARLO: Yes.

2 HEARING OFFICER FAY: I'm informed that
3 Mr. Simpson was disconnected from the line during
4 your comments. Mr. Simpson, can you guide us?
5 Are you at a loss for Ms. DeCarlo's statement of
6 staff position?

7 MR. SIMPSON: I missed most of it. I
8 lost it when you were talking to me, I'm obviously
9 back on the line now. Yes, I would like to
10 respond to at least what I heard.

11 You point out a number of opportunities
12 for comment. I understand that I can continue to
13 comment, but am I expected the opportunity to have
14 a response to my comments?

15 HEARING OFFICER FAY: Well, what Ms.
16 DeCarlo said is that the law requires that the
17 staff respond to comments on their preliminary
18 analysis, and that they believe they accorded that
19 to everybody on the substantive matters.

20 If you have a procedural comment they
21 wouldn't necessarily respond to that. And if it's
22 a comment on a later document, that, in their
23 opinion, is not covered by the same statutory
24 section.

25 Are you aware of the opportunities you

1 have in the future for comment in this process?

2 MR. SIMPSON: Yes. And, again, I ask am
3 I afforded a response to my comments? Because to
4 date I have seen no response to my comments.

5 HEARING OFFICER FAY: Okay. We'll note
6 that. That's certainly something that you deserve
7 as the process moves along in the future.

8 Anything further then on this matter of
9 Mr. Simpson's request for remedial action? Ms.
10 Luckhardt, --

11 MR. SIMPSON: Yes, --

12 HEARING OFFICER FAY: Oh, I'm sorry, Mr.
13 Simpson, you had something further?

14 MR. SIMPSON: Yes. I'd like to clarify
15 the air quality table that I included. The most
16 different thing that it includes something in the
17 middle of the 600-page report, or to include it in
18 a public notice. But the public notice is
19 supposed to be our call to action. It's supposed
20 to give us some information about why we would
21 want to participate in this proceeding.

22 That table is what's identified in the
23 Clean Air Act as what's supposed to be in a public
24 notice. If you're not providing information about
25 the effects of the project on air quality, then

1 what is the public notice. It's just a propaganda
2 piece.

3 You're not providing facts; you're not
4 providing facts on the effect on air quality.
5 You're not providing the facts on the water usage
6 of the facility. And so it doesn't satisfy the
7 requirement of a public notice.

8 HEARING OFFICER FAY: Okay. Understand
9 your position. Anything further before we go to
10 the applicant and see if they have a response?

11 MS. DeCARLO: I don't believe I've fully
12 gone through all of Mr. Simpson's complaints in
13 the remedial filing.

14 HEARING OFFICER FAY: Oh, I'm sorry, Ms.
15 DeCarlo. Okay, hang in there with us, Mr.
16 Simpson, and try to listen to what the response of
17 staff is. Go ahead, Ms. DeCarlo.

18 MS. DeCARLO: And with regard to the
19 last statement Mr. Simpson made regarding the
20 Clean Air Act requirement for noticing provisions,
21 those do not apply to the Energy Commission in
22 this proceeding. We fully complied with our
23 particular noticing requirements.

24 In the FSA, a notice of availability.
25 We've identified a brief description of the

1 proposed project. We've provided the link to
2 where people could go on our website to find more
3 detailed documents, the FSA, the AFC, the FDOC.

4 We're also provided a form that they can
5 fill out if they want a personal copy, either on
6 CD or a written document of the FSA. And we
7 provided the information for the Public Adviser to
8 further assist people who have questions
9 concerning the project.

10 So I believe our public noticing
11 provisions fully make the public aware of all the
12 information that's available to them, should they
13 be interested in the project.

14 I should also note that we did have an
15 FSA workshop at which we did receive comments on
16 the final staff assessment. As a courtesy to the
17 people of Avenal we went down there. And staff
18 was available to respond to comments and concerns
19 raised at that point on water analysis.

20 HEARING OFFICER FAY: Is that FSA
21 workshop required by statute or regulation?

22 MS. DeCARLO: No, it is not. We simply
23 did it as a way to conduct further outreach to the
24 community, who we know had raised concerns about
25 the impacts of the project.

1 Mr. Simpson's second comment is with
2 concern to Public Resources Code section
3 21092(b)(1). And that's a requirement as to the
4 specific requirements with regard to the noticing
5 of draft environmental documents.

6 We have fully complied with that, as
7 well. The notice of the PSA workshop was made --
8 and this, again, is with regard to the lead
9 agency's draft environmental document. It's not a
10 requirement on the final environmental document.

11 And the provisions concerning the draft
12 noticing and requirements. We did mail out the
13 PSA workshop notice on February 4th, and the
14 notice of availability on February 11th. And
15 those two documents indicating that the PSA had
16 been issued by staff.

17 And then there was a workshop in which
18 to receive comments that fully outlined, described
19 the proposed project, brief description. It
20 identified the preliminary areas of potential
21 impact. And it identified that the public had an
22 opportunity to submit comments either in person at
23 the PSA workshop or in writing. And we did
24 provide a 30-day public comment period for that.
25 So we fully complied with the Public Resources

1 Code provision to which Mr. Simpson references.

2 HEARING OFFICER FAY: And, Ms. DeCarlo,
3 are you aware of any violation of the district in
4 terms of its noticing the public?

5 MS. DeCARLO: No. Mr. Simpson makes a
6 broad statement that the district has failed to
7 comply with its noticing requirements. However, I
8 did a brief look yesterday at what the district
9 did do, and the applicable provisions in its
10 regulations to which it had to conform. And I
11 believe it has fully conformed.

12 Mr. Simpson cites to the incorrect
13 provision in the district's rules, I believe. He
14 cites to rule 5.4. However, where the Energy
15 Commission is siting a project, the rules are a
16 bit different for the district to handle its
17 process.

18 In those situations where the Energy
19 Commission is the lead agency, the district rule
20 section 5.8 applies. And it's a little route you
21 have to take. So 5.8 of district rule 2201
22 applied. And 5.8 directs for noticing directs us
23 to section 5.5.

24 And section 5.5 for the air district
25 requires that within ten calendar days of their

1 preliminary decision, their preliminary
2 determination of compliance, PDOC, they shall
3 publish in at least one newspaper of general
4 circulation in the district, a notice stating that
5 the PDOC is available. Noting how information can
6 be obtained, and inviting written public comment
7 for a 30-day period.

8 And I looked at the PDOC, which is on
9 our website, as well as the FDOC, and both contain
10 the actual statement that was filed in The Fresno
11 Bee. And that meets the requirements of 5.5. It
12 identifies that a PDOC had been issued; that there
13 is a 30-day comment period. And it directs
14 parties who are interested, public, to have any
15 comments on that, how they can obtain a copy of
16 the PDOC. So I believe the district has fully
17 complied with its requirements.

18 HEARING OFFICER FAY: Thank you.
19 Anything further on this matter from the staff?

20 MS. DeCARLO: If you want me to go
21 through more of his comments with regard to Mr.
22 Simpson was disconcerted that we did not record
23 the FSA workshop. And he believes that this is a
24 violation of regulations.

25 However, there's no requirement that we

1 record staff workshops. And usual practice, we do
2 not. They're simply staff workshops. We have
3 staff available to respond to public comment. If
4 it's a PSA workshop we will take specific notes in
5 order to insure that we fully documented what
6 comments were raised so that we can respond to
7 them in writing in the FSA. But there is no
8 requirement that such workshops be recorded. And
9 we do not believe that the lack of recording
10 shortened or prevented any public participation.

11 HEARING OFFICER FAY: Okay. All right.
12 Mr. Simpson, if you wouldn't mind just waiting
13 until we hear from any other parties, then we'll
14 give you the last bite of the apple. How's that?

15 MR. SIMPSON: Thank you.

16 HEARING OFFICER FAY: Okay. Ms.
17 Luckhardt, do you have anything to say on this
18 matter?

19 MS. LUCKHARDT: It's always difficult
20 for the entity that is not doing the noticing to
21 provide the best information on the noticing. So,
22 we support staff.

23 Our review of the noticing that staff
24 has done, as well as the noticing that the
25 district has done, we believe that both entities

1 have followed the noticing requirements that are
2 required of them.

3 And we also would just note that yes,
4 there was an informational hearing and site visit
5 held on this project quite awhile ago. That was
6 one of the issues that he brought up, which was
7 this done. And, yes, it did occur.

8 And so we support the staff's comments.
9 And we also just wanted to note that Mr. Simpson
10 was not at the FSA workshop, so he wasn't able to
11 attend that.

12 HEARING OFFICER FAY: Yes. And I'll
13 just note that the application for this project
14 was found data adequate in April of last year, of
15 2008. And I don't have the exact date, but I
16 believe that within approximately 30 days of that
17 time an informational hearing and site visit was
18 publicly noticed, and took place at the project
19 site.

20 MS. DeCARLO: Yeah, we have the
21 informational hearing on May 20th.

22 HEARING OFFICER FAY: May 20th, thank
23 you. Okay.

24 Anything further, Ms. Luckhardt, from
25 the applicant?

1 MS. LUCKHARDT: No.

2 HEARING OFFICER FAY: Okay. Does any
3 other party wish to weigh in on Mr. Simpson's
4 request for remedial action?

5 MS. BROSTROM: Yes, this is Ingrid
6 Brostrom from Center on Race, Poverty and
7 Environment. Just a couple of things.

8 First, was the informational meeting.
9 I, too, object to that not being recorded. And
10 we're hearing today that one of the
11 justifications, Lisa was saying that there was
12 sufficient response for comment.

13 However, all the comments that were made
14 at these informational meetings are not going to
15 be subject to the decisionmakers.

16 And I was there at the last one and at
17 the previous one. And there were really great
18 comments that were made. And unfortunately, those
19 are not recorded; those are not responded to
20 officially. Nor are they -- the CEC, (inaudible)
21 district.

22 Whereas I don't believe that that can
23 compensate for any lack of response to the written
24 comments. And I --

25 HEARING OFFICER FAY: Let me just

1 clarify something. You referred a couple times to
2 an information event. And the regulations, the
3 statute defined informational hearing at the
4 beginning of the case. That was recorded by a
5 court reporter. I believe you're talking about a
6 staff-sponsored workshop, which is typically not
7 recorded, so that there's enough give-and-take
8 among the parties that they can actually be frank
9 with each other, and not have to speak for the
10 record.

11 Is that correct, that you're actually
12 talking about the staff workshop?

13 MS. BROSTROM: That is correct, the
14 recent workshop.

15 HEARING OFFICER FAY: Okay, thank you.

16 MS. BROSTROM: Yeah, I am objecting to
17 the fact that they're not recorded, and the public
18 comment -- see that those are not given to the
19 decisionmakers.

20 HEARING OFFICER FAY: Okay, thank you.

21 All right, Mr. Simpson, then. Is there anybody
22 else that wants to wade in on this before we ask
23 Mr. Simpson for his rebuttal?

24 MR. SWANEY: Yes. This is Jim Swaney
25 with the San Joaquin Valley Air District.

1 HEARING OFFICER FAY: Okay, go ahead.

2 MR. SWANEY: I have not seen the
3 specific complaint of Mr. Simpson submitted to the
4 CEC. But we have had discussions with him in the
5 past about what our noticing procedures are, and
6 whether we followed those in the case.

7 So I just wanted to say that I do agree
8 with what Ms. DeCarlo had said, and I appreciate
9 her coverage of the issue.

10 Thank you.

11 HEARING OFFICER FAY: Great. Thank you
12 for your input on that.

13 Okay. Now we'll turn to Mr. Simpson.

14 MR. SIMPSON: Thank you. Can anyone
15 identify if public notice has gone out that
16 includes the address of this facility?

17 HEARING OFFICER FAY: Well, the location
18 of the facility was given in some detail in the
19 original notice for the informational hearing and
20 site visit. I don't believe you attended. That
21 was --

22 MR. SIMPSON: Okay.

23 HEARING OFFICER FAY: -- last year.

24 MR. SIMPSON: Again, is there any notice
25 that includes the address of this facility?

1 HEARING OFFICER FAY: Well, the
2 application for certification includes the
3 address. And that's been in local public
4 libraries for about a year and a half now.

5 MR. SIMPSON: Okay. Again, is there any
6 public notice that's gone out that's included the
7 address of this facility?

8 MS. DeCARLO: All of our public notices
9 for staff include a general description of the
10 location. And they include a link and several
11 ways for the public to obtain further detail about
12 the proposed project. There's no statutory
13 regulatory requirement that our notices contain
14 the exact address of the proposed project.

15 HEARING OFFICER FAY: Okay.

16 MR. SIMPSON: So that --

17 MR. SWANEY: This is Jim Swaney with the
18 San Joaquin Valley Air District. The notices that
19 we sent out, including the newspaper notice, does
20 list the location of the project, just not with
21 the street address. It gives the section and
22 township and range location, as well as the
23 assessor's parcel number.

24 MR. SIMPSON: So I think what I'm
25 hearing is no, there's no notices that include the

1 address of the facility?

2 HEARING OFFICER FAY: Well, I think what
3 you've heard is that while there is no street
4 address, the exact location of the site has been
5 included in a number of notices available to the
6 public.

7 MR. SIMPSON: I see. Is there any
8 notice that includes the identification of a
9 significant effect on the environment?

10 HEARING OFFICER FAY: Well, notice of
11 availability of the preliminary staff assessment
12 and the final staff assessment refers the public
13 to lengthy detailed documents that describe the
14 potential environmental impacts.

15 MS. DeCARLO: And the notices,
16 themselves, identify, in brief, those areas that
17 staff identified of particular concern or where
18 potential impacts were identified and resolved, or
19 mitigated.

20 HEARING OFFICER FAY: Thank you, Ms.
21 DeCarlo. Anything further, Mr. Simpson?

22 MR. SIMPSON: Oh, yeah. I'm looking at
23 section 21092 that I cited in my request for
24 remedial action, and the notice is supposed to
25 include identification of significant effects on

1 the environment.

2 Now, staff concluded that there's no
3 significant effects on the environment apparently,
4 so they included no notice as table 14 provided.
5 I think that's incorrect assumption that there's
6 no significant effects.

7 HEARING OFFICER FAY: So you're saying
8 you disagree with the staff conclusion?

9 MR. SIMPSON: I'm saying that the notice
10 is required to include any significant effects on
11 the environment. And no notice has done that. No
12 notice has mentioned anything about these effects
13 on air quality as table 14 does. No notice has
14 included the address.

15 To identify the location in metes and
16 bounds when there's an address available can only
17 serve to confuse the public. To find someone who
18 understands the system of locating a project, it
19 was easy enough for staff to have included a map
20 of the location of the hearing. But there was
21 never a map of the location of the site. There
22 was never an address published. The Clean Air Act
23 requires their notice include the address. The
24 notice doesn't include the address.

25 There's a number of requirements that

1 aren't met in any of these notices. When we look
2 at the FSA, in my document it shows a number of
3 requirements for public notice. Whether it's a
4 major source is supposed to be on it.

5 The emissions are supposed to be
6 noticed. I've got SSIPE notification item F,
7 which is on page 50 of the FDOC. There's a chart
8 there; it's copied in my filing. It shows that
9 the nitrous oxide is supposed to be noticed if
10 it's over 20,000 pounds. Carbon monoxide is
11 supposed to be noticed if it's over 20,000 pounds.
12 They each say yes, public notice is required of
13 these things.

14 No notice has gone out that included any
15 reference to air quality effects. No notice has
16 gone out that included any quantities of
17 pollution, any basis for a comparison of the
18 standard to the effects from this facility.

19 There's a whole stack of these, the
20 offset thresholds. There's a whole list of public
21 notice requirements, everything except -- nitrous
22 oxide, carbon monoxide, VOC, PM10 are all supposed
23 to be noticed. None of this has been noticed.

24 You haven't given the public the
25 information they need to decide if they want to

1 participate in it.

2 The air quality district notice doesn't
3 include anything about air quality. It doesn't
4 say air quality. It doesn't identify what the
5 facility does. There's no call to action in any
6 of those. They're all issued as either something
7 that will be ignored, or something that is
8 apparently designed to make the public feel it is
9 all okay, that they don't need to participate.

10 I contend that if the information, as
11 required by federal statute, was included in any
12 of these notices then you would have much more
13 public participation. If table 14 was in a public
14 notice, like it's required, there would be more
15 participation in this proceeding and other
16 proceedings.

17 And as long as it's kept a secret that
18 the actual attainment status of this area, that
19 the effects on air quality are kept secret, it's
20 not realistic to believe that you'll get public
21 participation in these proceedings. And it's not
22 realistic to believe that it will survive scrutiny
23 of the Clean Air Act.

24 HEARING OFFICER FAY: Okay, thank you.

25 We have your arguments. And I'll just note that

1 since they are procedural arguments, you'll have
2 an opportunity to argue those in your briefs, as
3 well, at the end of the evidentiary hearings.

4 So, --

5 MS. LUCKHARDT: If I could just add one
6 thing. The project site does not currently have a
7 street address. So the cross-streets and the maps
8 that are included in the AFC and in the PSA and
9 the FSA truly are the best way to identify the
10 location of the project. There is no official
11 street address for the project yet.

12 MR. SIMPSON: I'm sorry, I was just told
13 that there was an address in the AFC.

14 HEARING OFFICER FAY: No. You were told
15 that there is no street address that exists. And
16 so the description in the AFC is as specific as
17 can be given at this time until, I suppose, the
18 county or the city assigns a street address to the
19 project.

20 Okay, I think we've heard enough on Mr.
21 Simpson's request for remedial action.

22 The last motion was Avenal's objection
23 to the testimony of the Sierra Club and CRPE. And
24 they filed that yesterday. And then this morning
25 at 1:14 a.m., Mr. Simpson filed a one-page

1 objection to Avenal's objection.

2 So, we'll let Ms. Luckhardt lead.

3 MS. LUCKHARDT: Right, and that's fine.

4 Understanding that that was just filed yesterday,
5 let me just pull up the Sierra Club's filing here
6 and then I'll --

7 MR. VINNARD: Maybe I can shortcut this,
8 ladies and gentlemen. We are not going to --

9 HEARING OFFICER FAY: Could identify
10 yourself, please, sir?

11 MR. VINNARD: Sorry, this is Gerald
12 Vinnard, again. I'm sorry. We are not going to
13 be presenting any evidence from the --

14 HEARING OFFICER FAY: Sierra Club plans
15 not to present any evidence?

16 MR. VINNARD: That is correct.

17 HEARING OFFICER FAY: Okay. We saw your
18 list, your witness list --

19 MR. VINNARD: We are not going to be
20 presenting those witnesses.

21 HEARING OFFICER FAY: Okay, all right.
22 That simplifies things. So we don't need to go
23 forward on that at all.

24 So that concludes the procedural
25 matters, and we'll just go off the record for a

1 moment.

2 (Off the record.)

3 HEARING OFFICER FAY: And we will go
4 back on the record at 10:30 promptly.

5 Just a moment --

6 MS. DeCARLO: Since the witness
7 identification was attached to the joint filing
8 with CRPE, could we get confirmation that CRPE, as
9 well, does not intend to call these witnesses?

10 HEARING OFFICER FAY: Good point, Ms.
11 DeCarlo. Yes. The Committee interpreted that
12 filing as joint for both parties. Does CRPE agree
13 with the Sierra Club representative that they do
14 not intend to pursue that?

15 MS. BROSTROM: That list was generated
16 by the Sierra Club; CRPE did file jointly with
17 them. We had not planned on taking a lead on the
18 witnesses, however now that the Sierra Club is
19 withdrawing it, I can't say that CRPE certainly
20 will not, probably. Because we haven't planned
21 to. But I can't give you a definite answer right
22 now.

23 HEARING OFFICER FAY: Okay. Well, then
24 we will address that matter when we return. So,
25 there are three procedural matters that I

1 discussed, the first of which is before the full
2 Commission and we will not speak further on.

3 But the last three we will get back to
4 you at 10:30. So we'll see everybody back on the
5 record at 10:30.

6 (Off the record.)

7 HEARING OFFICER FAY: We are back on the
8 record. I apologize, we're five minutes late by
9 our own estimations, but there was a vigorous
10 discussion of these matters and we wanted to get a
11 fair hearing.

12 The Committee has reached a decision,
13 and it is as follows: The June 18th motion by the
14 applicant to strike the Simpson testimony is
15 granted in all matters except exhibit W. And that
16 is identified as regarding interpollutant trading.
17 That is relevant to the Avenal application
18 arguably. It's an undated document, three pages.
19 Mr. Simpson may testify to that, and must defend
20 it on his own, as a witness.

21 And as to all the other matters, the
22 Committee felt that they must be excluded either
23 because they're not relevant to this particular
24 application because of the different technology or
25 the different air district rules, et cetera,

1 different location of the project.

2 Or that it's simply not testimony.

3 Because we do not bootstrap a comment from another
4 proceeding into testimony in a different
5 proceeding. And in other cases there is no -- no
6 witness has been identified as being available to
7 sponsor, in the case of some of the academic
8 papers.

9 So I think that pretty much covers all
10 the serious flaws with this long list of documents
11 in terms of it being testimony in this case. Not
12 that there aren't topics discussed that may well
13 be relevant.

14 And Mr. Simpson or any other party in
15 the case may choose to bring those up. They may
16 offer the information as public comment. They may
17 choose to cross-examine some of the witnesses in
18 the case that will be available regarding some of
19 these matters, if the matters are relevant to the
20 Avenal application.

21 But based on the Committee's ruling only
22 Avenal W will be admitted as Mr. Simpson's
23 testimony.

24 Now, the next matter is that Mr. Simpson
25 filed a request for remedial action. And based on

1 the arguments that we heard, that the Committee
2 heard before them, the Committee decided that that
3 request is denied. And that it has not been
4 substantiated. And has been adequately rebutted
5 by comments of staff, in particular, and the
6 applicant.

7 Mr. Simpson, if he wishes, can pursue
8 that in other forums. And that concludes the
9 Committee's resolution on the June 29th Simpson
10 request for remedial action.

11 As to the June 29th Avenal objection to
12 the testimony of the Sierra Club, arguably it was
13 made moot by the Sierra Club withdrawing their
14 request to submit testimony, although CRPE was
15 vague about whether they went along with that.

16 The fundamental problem that the
17 Committee sees is that that list of witnesses and
18 proposed testimony was filed at the time the
19 prehearing conference statements were due, on June
20 22nd.

21 But, in fact, testimony was due to be
22 filed on June 9th, and rebuttal testimony on -- or
23 rather, June 8th, and rebuttal testimony on June
24 15th.

25 Neither of those dates were met by the

1 Sierra Club or CRPE, so there was no prefiled
2 testimony. Therefore, there can be no testimony
3 at the hearing, because that would produce
4 surprise, a surprise witness and surprise
5 information. And that's not consistent with the
6 Committee order of the hearings.

7 So, regardless of how CRPE comes out on
8 this, that testimony will not be allowed at the
9 hearing.

10 So that concludes the Committee's
11 handling of the procedural matters. Yes?

12 MS. BROSTROM: Yes, Ingrid Brostrom,
13 CRPE. I was just wondering if I might have a
14 second to respond, primarily to the prehearing
15 conference issue, which you had started this
16 hearing with by saying it would be excluded
17 because it was untimely and the CEC did not grant
18 leave.

19 And I really wanted to point out at that
20 point, but didn't get an opportunity, that, in
21 fact, both the Sierra Club and CRPE created that
22 document because both of us were contacted by the
23 CEC granting us leave to submit such a statement.

24 Neither of us had planned to, and once
25 we were contacted, we took that opportunity to

1 submit it late. And so I just did want to point
2 out that we were both contacted by phone. John
3 Honnette also received an email by CEC Staff
4 saying that, you know, we could still submit our
5 prehearing conference. And that's why we did
6 that.

7 I also wanted to point out that there is
8 no prejudice by having this late submitted
9 document because this is the same information that
10 CRPE has been objecting to all along. It's
11 basically a CEQA argument. We submitted comments
12 on it initially, we have told the applicant our
13 issues at the June workshop that they've attended.

14 And I'd also like to note that the
15 applicant did not object to the prehearing
16 conference statement.

17 And for those reasons I would ask the
18 CEC to consider that in deciding whether or not to
19 accept these documents.

20 HEARING OFFICER FAY: Okay. I don't
21 know what the circumstances were that led you to
22 believe that there was an invitation to file a
23 late prehearing conference statement. It was not
24 an expression by the Committee. And I apologize
25 if there was confusion on that, that made you go

1 to extra effort.

2 But there can be no question that the
3 scheduling order issued by the Committee in April
4 laid out the filing dates for the testimony and
5 rebuttal. And that has to be met by all the
6 parties. And so without prefiled testimony it
7 creates an unfairness to the other participants in
8 the case.

9 The fact that you've previously made
10 arguments does not resolve that, because we need
11 to know exactly what your witnesses plan to
12 testify about at the hearing, so that the parties
13 can be fully prepared, rather than make some
14 reference to the fact that, our party's been
15 saying this all along, and therefore everybody
16 should be on notice that they would continue to
17 make a similar position known in their testimony.

18 So, you have the Committee's ruling.
19 And I understand your arguments, but the rulings
20 stand.

21 Now, what we'd like to do next is move
22 to the substantive areas for the evidentiary
23 hearing. And the Committee has discussed this
24 very briefly in terms of some of the more
25 controverted areas, and of particular interest to

1 the public and many of the parties.

2 And what we propose in response to a
3 request from staff is that the first topic to be
4 taken up on the morning of June 7th at 10:00 in
5 the morning is greenhouse gas impacts from the
6 project for a number of reasons.

7 That topic involves probably as much
8 public interest as any other topic. It also
9 involves the most witnesses, and will allow the
10 witnesses to be freed up at an early time in the
11 process. And we'll make sure that everybody knows
12 when greenhouse gases will be addressed.

13 We would logically follow that with the
14 hearing on air quality. And then on public health
15 matters.

16 So, I think there's a logical flow
17 there. And I put that out. If there's any
18 serious concern or problem with that, please let
19 us know at this time.

20 MR. VINNARD: This is Gerald Vinnard.
21 We have no problem with that.

22 HEARING OFFICER FAY: Okay. And what
23 I've got from the parties that filed prehearing
24 conference statements is that we would -- both the
25 staff and applicant have listed their witnesses.

1 And the applicant estimates approximately an hour
2 cross-examination. And staff estimates
3 approximately 45 minutes cross-examination.

4 MS. DeCARLO: Would that, I'm sorry, be
5 direct testimony for each of those?

6 HEARING OFFICER FAY: Well, this was
7 listed, as I understand, as cross-examination time
8 that you sought. So tell me what you --

9 MS. DeCARLO: No, I believe we
10 identified direct testimony.

11 HEARING OFFICER FAY: Okay.

12 MS. DeCARLO: We do not intend to cross-
13 examine the applicant in any of these areas. And
14 now with the identification of Rob Simpson as a
15 witness for that one exhibit, we can add, if this
16 is the appropriate time, we would like about a
17 half an hour to do cross-examination.

18 HEARING OFFICER FAY: Okay.

19 MS. LUCKHARDT: Ours is, as well. We
20 had estimated time for direct and a limited time
21 for cross of staff's witness. And then we were
22 unsure on the timing for Mr. Simpson, because we
23 were unsure as to how many documents would be or
24 would not be admitted.

25 HEARING OFFICER FAY: So, about half an

1 hour?

2 MS. LUCKHARDT: Sure.

3 HEARING OFFICER FAY: Okay. All right.

4 MS. LUCKHARDT: That's probably long.

5 HEARING OFFICER FAY: Okay. And we
6 don't have testimony on this topic from any other
7 party except Mr. Simpson.

8 Mr. Simpson, how long do you think your
9 direct will take?

10 MR. SIMPSON: Forty minutes.

11 HEARING OFFICER FAY: Forty minutes?

12 MR. SIMPSON: Yes.

13 HEARING OFFICER FAY: All right. And
14 cross-examination of the staff and applicant?

15 MR. SIMPSON: Twenty minutes for each
16 witness.

17 HEARING OFFICER FAY: Thank you. And
18 Sierra Club and CRPE, can you give us any guidance
19 on how long --

20 MR. VINNARD: Cross-examination. Gerald
21 Vinnard, again. We don't expect to cross-examine
22 any witnesses.

23 HEARING OFFICER FAY: Okay. CRPE, do
24 you?

25 MS. BROSTROM: Yes, likely on each of

1 the issues, we have issues, but not a lot of time
2 on any of them.

3 HEARING OFFICER FAY: Okay. My question
4 is how much.

5 MS. BROSTROM: Fifteen minutes.

6 HEARING OFFICER FAY: Fifteen minutes
7 total?

8 MS. BROSTROM: No. Each.

9 HEARING OFFICER FAY: On each air
10 quality witness?

11 MS. BROSTROM: No. I'm sorry. Total
12 for each of the three specific areas.

13 HEARING OFFICER FAY: Oh, I see, okay.

14 All right. I took things out of order a
15 little bit. So that's air quality.

16 Let's go to greenhouse gas matters.

17 Both the staff and the applicant filed testimony
18 related to this. So, how long do you think, Ms.
19 Luckhardt, how long would your direct be on GHG?

20 MS. LUCKHARDT: Okay, I guess it -- I'm
21 sorry, Mr. Fay, I think I misunderstood when you
22 were speaking earlier. I thought you were talking
23 about greenhouse gas. I actually think the air
24 quality direct, given what we've done with the
25 exhibits, will be shorter, probably a half hour in

1 direct on air.

2 And my guess is that greenhouse gas will
3 take something between a half hour and 40 minutes,
4 something like that.

5 HEARING OFFICER FAY: And staff?

6 MS. DeCARLO: For direct we've estimated
7 about an hour.

8 HEARING OFFICER FAY: And does that
9 include your cross of the applicant?

10 MS. DeCARLO: We don't estimate having
11 any cross of the applicant.

12 HEARING OFFICER FAY: And the applicant,
13 the same, no cross --

14 MS. LUCKHARDT: The only cross we have
15 is a short amount in greenhouse gas.

16 HEARING OFFICER FAY: How long?

17 MS. LUCKHARDT: Like ten minutes.

18 HEARING OFFICER FAY: Okay. And the
19 other parties. Mr. Simpson, will you be cross-
20 examining the staff and the applicant witnesses?

21 MR. SIMPSON: Yes.

22 HEARING OFFICER FAY: And how long for
23 each?

24 MR. SIMPSON: I would expect 40 minutes
25 with the greenhouse gas.

1 HEARING OFFICER FAY: For each of the
2 witnesses?

3 MR. SIMPSON: I think -- Mr. Birdsall
4 and -- how many witnesses are there?

5 HEARING OFFICER FAY: Well, this was all
6 laid out in the prehearing conference statements.
7 You can refer to that. If you don't have an
8 estimate, that's all right, we'll move on.

9 MR. SIMPSON: Thirty minutes each.

10 HEARING OFFICER FAY: I'm sorry, what?

11 MR. SIMPSON: Thirty minutes each.

12 HEARING OFFICER FAY: Thirty minutes
13 each, okay.

14 Sierra Club?

15 MR. VINNARD: We don't anticipate any
16 cross-examination.

17 HEARING OFFICER FAY: All right. Does
18 this go for all the topics?

19 MR. VINNARD: Yes.

20 HEARING OFFICER FAY: Okay. And CRPE?

21 MS. BROSTROM: Yes, 15 minutes again,
22 total.

23 HEARING OFFICER FAY: Thank you. Moving
24 to public health.

25 MS. LUCKHARDT: I think we can adjust

1 our timeframe on public health. And my guess is
2 we'll do a short summary of the testimony. Our
3 intention on public health was to have our witness
4 available for responding to any concerns or
5 questions that may come from the other parties.

6 HEARING OFFICER FAY: Okay. And you
7 don't anticipate any cross-examination of staff?

8 MS. LUCKHARDT: No.

9 HEARING OFFICER FAY: Okay, thank you.
10 So I'll just --

11 MS. LUCKHARDT: It's like ten minutes
12 for direct on public health.

13 HEARING OFFICER FAY: And, staff?

14 MS. DeCARLO: We didn't identify public
15 health witness in our prehearing conference
16 statement. However, if that is a topic other
17 parties would like to cross-examine staff on, we
18 can have staff witness available, Obed Odoemelam,
19 which is our expert witness. And his testimony is
20 included in the final staff assessment.

21 I imagine we'll have about 15 minutes
22 direct summary of his testimony, and then he'll be
23 available for cross, if necessary.

24 HEARING OFFICER FAY: We're off the
25 record for a moment.

1 (Off the record.)

2 HEARING OFFICER FAY: The staff should
3 plan on having --

4 MR. SIMPSON: -- Rob Simpson --

5 HEARING OFFICER FAY: Yes.

6 MR. SIMPSON: Each time you go off the
7 record my phone is muted. Is that --

8 HEARING OFFICER FAY: Well, it doesn't
9 matter because there was nothing said on the
10 record. So, you didn't miss anything. Nothing
11 was said. If you phone was muted during that
12 time, there was nothing that you missed.

13 MR. SIMPSON: Okay, it's been muted a
14 few times, is that necessary?

15 HEARING OFFICER FAY: I'm not sure how
16 that's working. We'll try to keep it open for
17 you.

18 MR. SIMPSON: Thank you.

19 HEARING OFFICER FAY: Now, the other
20 parties, do you plan to cross-examine? Mr.
21 Simpson, do you plan to cross-examine the
22 witnesses on public health?

23 MR. SIMPSON: Yes, maybe 15 minutes.

24 HEARING OFFICER FAY: Is that 15 minutes
25 total?

1 MR. SIMPSON: Yes.

2 HEARING OFFICER FAY: Okay. And CRPE?

3 MS. BROSTROM: Yeah, I'd like 20 minutes
4 total.

5 HEARING OFFICER FAY: All right. Now,
6 most of these other areas are less complex at this
7 point in the case. They have been addressed
8 through various public workshops. And I'd like
9 the staff or the applicant to correct me if I'm
10 wrong, but I believe that there is a complete
11 meeting of the minds on the conditions of
12 certification for all the areas that remain.

13 MS. LUCKHARDT: That is correct.

14 HEARING OFFICER FAY: Okay. So, the
15 staff and the applicant normally would submit
16 their testimony in all these areas with a
17 declaration from the witness. And it's submitted
18 under penalty of perjury, et cetera.

19 But the witness would not be available
20 for cross-examination, because it's an undisputed
21 area. So, what I need to know from each of the
22 other parties is what your opinion is on whether
23 the topic area is still in dispute.

24 And I think the most efficient way to do
25 this would be just to go down the list of the

1 remaining topics and identify whether or not you
2 feel the need to cross-examine.

3 I have to tell you that doesn't mean the
4 Committee is going to direct the staff and
5 applicant to have those witnesses available. You
6 can't just say, well, as far as we're concerned
7 it's all in dispute. It's not one of those magic
8 things.

9 We haven't seen, with the exception of
10 the one area that was allowed by Mr. Simpson,
11 which is related to air quality, we haven't seen
12 testimony filed in rebuttal to the adjustments
13 that have been made during the case in all the
14 other topic areas.

15 But I do want to hear from the parties.
16 So I'm going to go through each topic area just to
17 give you a chance to make your arguments, if you
18 have any.

19 Now the first is the executive summary
20 and project description. And I can just say right
21 now we expect the applicant to have a witness who
22 can give a brief presentation on that for the
23 benefit of the public so that they completely
24 understand the project.

25 We do not expect the staff to provide a

1 witness on that.

2 I'll also mention that in these areas
3 that are subject to being introduced with the
4 testimony only on a declaration, rather than a
5 live witness, that doesn't mean that the topic
6 can't come up.

7 We will take public comment on those
8 topics. And if people have questions, the
9 questions will be put to the project managers,
10 who, in many cases, can answer the questions. So
11 it doesn't foreclose learning any information
12 about the topic.

13 All right, moving on. The next one is
14 cultural resources. And I do not anticipate that
15 there will be a witness available from either the
16 staff or the applicant, is that correct?

17 MS. LUCKHARDT: That is correct.

18 MS. DeCARLO: That's correct. .

19 HEARING OFFICER FAY: All right. Do any
20 of the -- any argument from any of the parties
21 that are out there on the phone line?

22 MR. VINNARD: Gerald Vinnard with the
23 Sierra Club. We have no comment on this.

24 HEARING OFFICER FAY: Okay. You don't
25 need to respond unless you have a disagreement

1 with what I'm proposing.

2 The next one is hazardous material
3 management. And, again, the staff and the
4 applicant have reached agreement on conditions of
5 certification. And all that information will be
6 presented as shown in the prefiled testimony that
7 you've already seen.

8 Any comments on that?

9 MR. SIMPSON: I do have a few questions
10 about -- throughout the --

11 HEARING OFFICER FAY: And what's the
12 nature of your questions, Mr. Simpson?

13 MR. SIMPSON: The relationship of the
14 ammonia storage and any relationship to the
15 California Aqueduct.

16 HEARING OFFICER FAY: All right. Ms.
17 DeCarlo, is that something that the project
18 manager could probably address? Or, Mr. Simpson,
19 are you talking about the geographical distance
20 between the ammonia storage and the aqueduct? I
21 mean how many feet away is it, that type of thing.

22 MR. SIMPSON: That's part of it, and the
23 effect of an ammonia spill in the aqueduct.

24 HEARING OFFICER FAY: Okay. Would staff
25 need to bring their witness to address that? Or,

1 can you just, you know, would the PM be able to
2 describe the containment approach, et cetera?

3 MR. SIMPSON: Well, I haven't received
4 any response to any of my inquiries with the
5 project manager, so I don't know if I can expect
6 -- so I would like to cross-examine the staff
7 witness.

8 MS. DeCARLO: If the question is whether
9 or not the analysis, cultural resources analysis,
10 included --

11 HEARING OFFICER FAY: This is hazmat.

12 MS. DeCARLO: Oh, this is hazmat. I'm
13 sorry. That might be a little more detailed than
14 the project manager --

15 HEARING OFFICER FAY: Okay, so can you
16 have your witness available?

17 MS. DeCARLO: Sure, we'll have Alvin
18 Greenberg, who is our expert witness on hazardous
19 materials --

20 HEARING OFFICER FAY: All right, would
21 that address your concerns, Mr. Simpson?

22 MR. SIMPSON: Sure.

23 HEARING OFFICER FAY: Good. Mr.
24 Greenberg's a knowledgeable witness and I'm sure
25 he'll be able to answer your questions.

1 Anything else from any other party?

2 MS. BROSTROM: Yes, insofar as the
3 cumulative impacts from hazardous waste with the
4 facility. And that might be dealt within the
5 health effects, I'm not sure.

6 HEARING OFFICER FAY: Is this
7 necessarily segregated, Ms. DeCarlo?

8 MS. DeCARLO: Well, we do have two
9 different witnesses.

10 HEARING OFFICER FAY: Right, but the
11 cumulative impacts from different facilities, is
12 that handled in both topic areas? Both hazmat and
13 public health?

14 MS. DeCARLO: Each addresses cumulative
15 impacts. I'm not sure which one this particular
16 issue would fall into, if it's solely one or the
17 other. It does seem to be a public health issue.
18 I don't know if that excludes it from being a
19 hazardous materials issue, as well.

20 HEARING OFFICER FAY: Well, we're going
21 to have witnesses on both topics, at least from
22 the staff. So I think that CRPE's questions can
23 be answered, or they will have an opportunity to
24 cross-examine the witnesses on this.

25 All right. Anything further then on

1 hazardous materials? I'm assuming the applicant
2 will not need to have somebody there.

3 MS. LUCKHARDT: Okay, we'll have our
4 project manager. We're just trying to figure out
5 whether we need anybody further. But, that's
6 fine.

7 HEARING OFFICER FAY: You know, I
8 haven't heard anything from the parties that
9 suggests --

10 MS. LUCKHARDT: Terrific, we will --

11 HEARING OFFICER FAY: -- that Mr.
12 Greenberg wouldn't be able to address the
13 concerns.

14 MS. LUCKHARDT: I'm sure he'll be able
15 to handle it --

16 HEARING OFFICER FAY: Okay.

17 MS. LUCKHARDT: -- quite adequately.

18 HEARING OFFICER FAY: Then I'd like to
19 move on. The next topic I have on my list is soil
20 and water resources. And that, again, is a topic
21 that the applicant and staff have reached
22 agreement on conditions of certification, and do
23 not plan to have a live witness available, other
24 than the knowledge of the project manager.

25 Any input from any of the parties on

1 that? Okay.

2 MS. BROSTROM: This is Ingrid Brostrom,
3 CRPE.

4 HEARING OFFICER FAY: Yes.

5 MS. BROSTROM: We had commented on our
6 initial CEQA comments that we were concerned with
7 construction worker safety in regard to the
8 construction site. The possibility that there are
9 pesticides.

10 HEARING OFFICER FAY: I think we
11 normally handle that under worker safety, is that
12 correct, Ms. DeCarlo?

13 MS. DeCARLO: Generally. However, in
14 response to the comments raised on this issue we
15 did include a new condition in the waste
16 management section addressing the requirement for
17 testing and potential remediation should any
18 potential hazardous materials be found on the site
19 prior to construction.

20 HEARING OFFICER FAY: And that would go
21 to CRPE's concern about risk to construction
22 workers?

23 MS. DeCARLO: Yes. It's in direct
24 response to the concerns that they raised.

25 HEARING OFFICER FAY: Okay. So, it

1 would not come up under soil and water resources.
2 So I'd like to -- anything further on soil and
3 water?

4 MR. SIMPSON: Yes. This is Rob Simpson.
5 I have questions on soil and water resources for
6 staff.

7 HEARING OFFICER FAY: And what are your
8 questions, Mr. Simpson?

9 MR. SIMPSON: The use of fresh water as
10 opposed to recycled water, and how that's
11 justifies the leap of logic in between the --

12 (Simultaneous teleconference
13 interruptions.)

14 HEARING OFFICER FAY: Can everybody
15 please be careful of any background noise, because
16 we're getting some interference and we're not able
17 to hear the participant that's speaking.

18 Mr. Simpson, back to you. You were
19 explaining why you wanted a witness on soil and
20 water to be present.

21 MR. SIMPSON: Yeah, my questions are
22 pertaining to the use of fresh water for this
23 plant, when recycled water is what seems to be
24 required by the Department of Water Resources
25 (inaudible).

1 MS. LUCKHARDT: Does Mr. Simpson
2 understand that this is a dry-cooled facility?

3 HEARING OFFICER FAY: Did you realize
4 that, Mr. Simpson?

5 MR. SIMPSON: Yes. I also understand
6 that it's permitted for 200 acrefeet per year.
7 So, the dry cooled word does not mean it doesn't
8 use water. There's significant water usage, which
9 again, is something that I feel --

10 HEARING OFFICER FAY: Okay. And it
11 occurs to me it's possible that the staff and
12 applicant may be able to address this through
13 their project managers. Can I hear from them?

14 MS. DeCARLO: Yeah, I'm sure the
15 Committee's aware of the significance of the staff
16 concerns that staff has. We've got a large
17 workload, we've got furloughs, so if we were to be
18 required to present witnesses in every technical
19 area, that would be a significant burden on the
20 staff to appear in Avenal.

21 I believe the particular issue of how
22 much water the proposed project is going to use,
23 what type of water that will be, and the legal
24 requirements as to what a project may or may not
25 use in terms of water could be addressed by the

1 project manager or staff in legal briefs.

2 HEARING OFFICER FAY: Okay. And,
3 applicant, anything?

4 MS. LUCKHARDT: We will have both our
5 project manager from the consulting firm here, Joe
6 Stenger, will be down there, as will Mr. Rexroad.
7 And I think that either of them could probably
8 explain the amount of water that the project is
9 proposed to use, and where it originates from.

10 HEARING OFFICER FAY: All right.

11 MS. LUCKHARDT: So if we need to address
12 that specific issue, if we want to get into more
13 detailed discussions of design and things like
14 that, then we'll have to confer. But, this
15 project is designed to use very little water, so.

16 HEARING OFFICER FAY: Okay. Mr.
17 Simpson, it sounds to me like your concerns and
18 your cross-examination questions would probably be
19 addressed by the expertise that will be there
20 between the staff and applicant.

21 So I'm not inclined to direct them to
22 bring further witnesses along. And I think you
23 ought to give it a shot and see if you can't get
24 satisfaction based on the knowledge that's there
25 on this topic.

1 MR. SIMPSON: Well, my concern's not the
2 amount of water, per se, that's clear enough.
3 It's the type of water that's used, and the
4 justification for use of that type of water as
5 opposed to what the state water policy is and what
6 the Commission's standing policy regarding the use
7 of recycled water.

8 HEARING OFFICER FAY: Sure. And
9 actually what you're articulating is the kind of
10 thing that while you could ask questions of the
11 available witnesses, you probably would want to
12 argue in your brief if you think that the project
13 is either not following applicable LORS or state
14 law, or that it's violating a policy. So I don't
15 think having more witnesses would necessarily
16 inform that better.

17 MR. SIMPSON: Casey Weaver (inaudible)
18 water resources.

19 HEARING OFFICER FAY: You're going to
20 have to repeat that, I couldn't hear you.

21 MR. SIMPSON: It's Casey Weaver's
22 testimony, staff testimony, that I would like to
23 examine.

24 MS. DeCARLO: Casey Weaver was a staff
25 witness who authored the soil and water resources

1 section in the FSA.

2 HEARING OFFICER FAY: And you want to
3 ask him about the topics that you've told us?

4 MR. SIMPSON: Yes.

5 HEARING OFFICER FAY: Okay. The
6 Committee will consider that and we may or may not
7 direct staff to bring that witness. As you heard
8 Ms. DeCarlo say, there's extreme constraints. And
9 we just can't make everybody available at such a
10 distance.

11 Okay, I'd like to move to traffic and
12 transportation. Again, it looks like the staff
13 and applicant don't anticipate any time for direct
14 or for cross on this. Are there concerns by any
15 of the parties on the line?

16 All right, I don't hear any, so assume
17 that will be fairly straightforward on traffic and
18 transportation.

19 Moving along to transmission line safety
20 and nuisance. Again, staff and applicant have
21 agreed upon conditions of certification to control
22 any potential impacts. Do any of the parties have
23 a problem with taking that testimony on
24 declaration?

25 MR. SIMPSON: Rob Simpson, again. I

1 will have questions.

2 HEARING OFFICER FAY: What questions
3 will you have, Mr. Simpson?

4 MR. SIMPSON: Well, the testimony is the
5 system can't handle this facility, that the
6 switching station can't handle the output, that
7 the transmission lines can't handle the output.

8 HEARING OFFICER FAY: Okay, hold on,
9 hold on. That's the kind of thing we address
10 under transmission system engineering.
11 Transmission line safety and nuisance has to do
12 with things like static buildup and things like
13 that, nuisance interference with radio
14 broadcasting, et cetera. So hold your thoughts on
15 the system and we'll bring that up under
16 transmission system engineering.

17 Now, the waste management questions that
18 CRPE had, Ms. DeCarlo, can those be addressed by
19 perhaps Mr. Greenberg if he's there?

20 MS. DeCARLO: Yeah, I believe that's a
21 question of whether or not staff has properly
22 mitigated the project to insure that there will be
23 no hazards to worker safety. It's a worker safety
24 issue. And Mr. Greenberg can obviously refer to
25 the conditions contained in the waste management

1 section in his testimony in his response to cross-
2 examination.

3 HEARING OFFICER FAY: All right. So
4 based on what you heard before from CRPE, you'd be
5 able to address that just with the witnesses that
6 you'll have there already?

7 MS. DeCARLO: Yes.

8 HEARING OFFICER FAY: Okay. All right.
9 Any concern from any of the parties on the line,
10 further, about waste management? There will be a
11 witness there to speak to many of these topics.

12 Okay. I hear nothing, so the next on my
13 list is facility design. And frankly, I think
14 that will, to the extent that we go into that,
15 it'll be covered by the applicant in their project
16 description. And I have not been informed by any
17 of the parties in the case that there are
18 particular concerns about the facility design.

19 Does anybody disagree with that?

20 MR. SIMPSON: Rob Simpson. When we talk
21 about facility design are we -- would faster
22 ramping technology, fast start technology be
23 included in that? Or would you like to hear that
24 in another section?

25 HEARING OFFICER FAY: Well, that's not

1 part of the design of this project, so I think if
2 you want to argue that, that's actually more
3 appropriate for the briefs. I take that's sort of
4 a policy level kind of thing, or if you think
5 there are some LORS that the project does not
6 comply with regarding that, again, that's
7 something for your briefs, for an argument at that
8 level.

9 I don't think having a witness there one
10 way or the other would make a great deal of
11 difference.

12 Is there anything else on facility
13 design you had in mind?

14 Okay, I don't hear that. Geology and
15 paleontology. Again, fairly esoteric. And the
16 applicant and staff have laid this out in their
17 testimony and their analysis of the project. Does
18 anybody have any concerns in that area?

19 Okay, I hear no expression. Power plant
20 efficiency. Again, the same thing. And as to Mr.
21 Simpson's concern if he thinks that the efficiency
22 is an issue regarding fast start, that's to be
23 argued in his briefs.

24 Compliance conditions, facility closure
25 really is not something we, I don't think, need to

1 worry about in terms of witnesses.

2 Socioeconomics. And the parties, the
3 staff and applicant, would not plan on bringing
4 witnesses. Is there any particular concern from
5 any parties on the line?

6 MS. BROSTROM: This is Ingrid, CRPE. I
7 would have concerns about socioeconomics as
8 related to the environmental justice assessment.

9 HEARING OFFICER FAY: Okay, Ms. DeCarlo,
10 where is the environmental justice addressed?

11 MS. DeCARLO: There's no one location.
12 We summarize the conclusions of staff in the
13 executive summary. But the issue of environmental
14 justice is folded into each technical area.

15 HEARING OFFICER FAY: All right,
16 assuming that CRPE or other parties are very
17 concerned about this, what witness do you have
18 that could address this and, you know, under what
19 topic?

20 MS. DeCARLO: I think their fundamental
21 concerns are with regard to public health and air
22 quality and how the potential impacts of the
23 project in those areas affect minority population,
24 and low income population. So I would assume that
25 the witnesses identified in those two areas would

1 be capable of addressing any, or responding to any
2 questions raised concerning how environmental
3 justice was analyzed in the two areas.

4 HEARING OFFICER FAY: Does CRPE -- did
5 you hear the comment, and do you agree?

6 MS. BROSTROM: I heard the comment. One
7 of our concerns was that it appeared in the
8 executive summary that the EJ assessment was based
9 solely on economic, socioeconomic criteria. And
10 so that's why I brought it up here.

11 HEARING OFFICER FAY: Well, I think what
12 you may have seen is the staff's review of what
13 the threshold rules are. And some of those rules
14 are socioeconomic; in other words, a certain
15 percentage of minority population, a certain
16 distance from the project, et cetera.

17 But those same criteria would be
18 addressed under public health because distance and
19 that sort of thing certainly affects any of the
20 receptors that are close to the project.

21 I think if your concern is the risk to
22 minority or low income populations from the
23 project, that the topics of air quality and public
24 health would probably provide the witnesses that
25 you would need to cross-examine on that.

1 MS. BROSTROM: I agree so long as the
2 CEC maybe amends its statement in the staff report
3 that there are no socioeconomic impacts, therefore
4 there is no environmental justice impacts. I
5 believe it might be some kind of typo or simple
6 error, but that is the statement that's in the
7 executive summary.

8 So as long as there's acknowledgement
9 that we are looking at health impacts and air
10 quality impacts, then --

11 HEARING OFFICER FAY: Well, I can't
12 speak for staff as to whether they plan to modify
13 that, but that's certainly something you can argue
14 in your briefs that the Committee should take into
15 account in addressing all the analyses of the --
16 from the different parties. Because, of course,
17 the Committee can produce a proposed decision that
18 summarizes the evidence.

19 The next topic is biological resources.
20 The staff and applicant have reached accommodation
21 on a set of conditions of certification that will
22 address that. I know there was input from State
23 Fish and Game on that matter. Do any of the
24 parties on the line have concerns regarding
25 biological resources?

1 MR. SIMPSON: Rob Simpson. Yes.

2 HEARING OFFICER FAY: What are they, Mr.
3 Simpson?

4 MR. SIMPSON: I'd like to see U.S. Fish
5 and Wildlife's biological report. Is that ready?

6 HEARING OFFICER FAY: I'll ask Ms.
7 DeCarlo. Do you know?

8 MS. DeCARLO: I'm not aware of the
9 status of the biological opinion. I know the Fish
10 and Wildlife Service is working on it. I don't
11 know if it's ultimately complete at this point.

12 HEARING OFFICER FAY: Ms. Luckhardt, do
13 you have --

14 MS. LUCKHARDT: It has not been issued
15 yet. They worked extensively with the staff and
16 the applicant within the process, and so we were
17 able to gain their agreement on the mitigation
18 measures, the additional land to be purchased, the
19 setback from the canal and those type of issues
20 that were of concern to Fish and Wildlife. And so
21 we believe that the issues of concern are
22 contained in the final staff assessment.

23 MS. DeCARLO: And I will note that
24 that's a federal document, and therefore the
25 Energy Commission is not necessarily constrained

1 from issuing a permit in this proceeding absent
2 the final biological opinion.

3 HEARING OFFICER FAY: The question comes
4 how will these details get into the record if
5 there are questions that go beyond the filed
6 testimony. I know it was an involved process.

7 Can you either have a representative of
8 the Fish and Wildlife Service or have a witness
9 that can track this process and be available to
10 the other parties?

11 MS. DeCARLO: Would you like someone who
12 can just testify as to the status of the
13 biological opinion at this point, if we can't get
14 a Fish and Wildlife Service representative there?
15 Or would you want an expert witness in biological
16 resources that can speak to the substance of the
17 subject matter?

18 HEARING OFFICER FAY: Well, I think,
19 given the agreement that's been reached, someone
20 that can testify to the state of agreement, to the
21 expectation on, you know, when the biological
22 opinion would come out, and give us some detail on
23 just how the agreement was reached would probably
24 be adequate. Is this something that staff can
25 provide?

1 MS. DeCARLO: Yeah. I'm not sure that
2 we can actually provide the expert witness who
3 provided the testimony in biological resources,
4 Dick Anderson. However, I would imagine we could
5 provide his supervisor, Rick York, or an equally
6 knowledgeable biologist to testify on behalf of
7 the staff.

8 HEARING OFFICER FAY: Yeah. Mr.
9 Simpson, I think your concerns on this could
10 probably be addressed by a knowledgeable review of
11 just what the issues were and what steps the
12 parties took to resolve it.

13 And that's what I would recommend we use
14 as an approach.

15 MR. SIMPSON: Well, I would --

16 HEARING OFFICER FAY: Go ahead, I'm
17 sorry.

18 MR. SIMPSON: I would like to examine a
19 witness from U.S. Fish and Wildlife that can
20 review the biological report from Fish and
21 Wildlife before we proceed with the biological
22 section of this proceeding.

23 HEARING OFFICER FAY: I understand your
24 interest on that, but you should realize that when
25 the biological report comes out, if it requires

1 something in addition to what the Energy
2 Commission requires, the federal requirement will
3 control.

4 So the conditions will be no weaker than
5 what the Energy Commission requires, regardless of
6 what the feds require. But it is possible they
7 could be more strict.

8 MR. SIMPSON: And what --

9 HEARING OFFICER FAY: Yes.

10 MR. SIMPSON: I'm sorry, what's the
11 mechanism to incorporating those determinations
12 into the CEC license?

13 MS. LUCKHARDT: This issue, actually,
14 was very extensively evaluated by all the
15 different participants. It was discussed, I
16 think, at a workshop in February or something to
17 that effect. A PSA workshop where we had
18 representatives from Fish and Wildlife there, we
19 had representatives from Fish and Game there, we
20 had the Energy Commission's biological consultants
21 there. We had the applicant's biological
22 consultants.

23 And we all sat down and talked about the
24 specific conditions of certification; all the
25 different mitigation banks that could be used; the

1 amounts to be used; the calculation of the
2 numbers. And went over all of that, and all the
3 different parties agreed on the final
4 requirements. We do not expect to see anything
5 different in the biological opinion from what we
6 discussed with staff. Because all parties, at
7 that time, agreed on the conditions, the
8 mitigation measure and the requirements.

9 And that was basically a settlement
10 agreement and --

11 HEARING OFFICER FAY: Settlement among?

12 MS. LUCKHARDT: Among Fish and Wildlife,
13 staff and Fish and Game and the applicant.

14 MR. SIMPSON: And so there's a
15 settlement agreement?

16 MS. LUCKHARDT: It's not a written
17 agreement. It was a discussion that occurred.
18 All parties who were present in the workshop
19 agreed to the mitigation measures. And it was a
20 settlement of an issue. The results of that are
21 all contained within the final staff assessment.

22 That contains all of the mitigation
23 requirements, including with the recent errata, it
24 includes both the mitigation banks that were
25 permitting to be used to purchase mitigation from.

1 It includes a 300-foot setback from the canal. It
2 includes the final numbers on the impact ratios,
3 the mitigation ratios and the impact numbers.

4 So it is all contained within the final
5 staff assessment at this point; in the biological
6 section of the final staff assessment.

7 HEARING OFFICER FAY: And, Ms. DeCarlo,
8 if, for instance, Mr. York was the witness who
9 came along, would he be able to testify regarding
10 this?

11 MS. DeCARLO: Yes, he was extensively
12 involved in the discussions and staff is
13 extensively coordinating with Fish and Game and
14 Fish and Wildlife Service in writing in the final
15 staff assessment.

16 HEARING OFFICER FAY: Okay. I think,
17 and you would be able to provide him? Or at least
18 a comparably --

19 MS. DeCARLO: If not him specifically,
20 then someone capable of discussing --

21 HEARING OFFICER FAY: Okay.

22 MS. DeCARLO: -- what occurred.

23 MR. SIMPSON: I'm sorry, I'm still not
24 clear. You indicated that there's a settlement
25 agreement. Is there a written settlement

1 agreement? Or there's a verbal agreement? And
2 was this workshop recorded?

3 MS. DeCARLO: This issue was initially
4 discussed, I believe, in our data response issue
5 resolution workshop. It was first brought up. No
6 resolution was reached at that point.

7 We then reconvened at the PSA workshop,
8 which was a publicly noticed workshop. Included
9 all the identified agencies, Fish and Wildlife
10 Service, Fish and Game, staff, the applicant. At
11 that workshop we reached agreement regarding the
12 mitigation requirements of the proposed project to
13 mitigate impacts.

14 And that agreement, the terms are
15 represented in staff's analysis and mitigation,
16 conditions of certification that we proposed. It
17 was not a recorded workshop, but it was publicly
18 noticed. And there were public in attendance.

19 HEARING OFFICER FAY: Okay. And you
20 could provide a witness who could testify about
21 that process and to the conclusion?

22 MS. DeCARLO: Yes.

23 HEARING OFFICER FAY: Okay. I think
24 that will address your concerns, Mr. Simpson.
25 And, as I said, the federal document, when it does

1 come out, will be controlling. And you can ask
2 the available witnesses their opinion on how
3 consistent the biological opinion is likely to be
4 with what is contained in the staff FSA.

5 MR. SIMPSON: Well, it sounds like Fish
6 and Wildlife was participating in this proceeding.
7 But now it won't be available to testify in these
8 hearings.

9 And one question I have is will the CEC
10 be posting notices of U.S. Fish and Wildlife's
11 public participation or opportunity to address
12 determinations.

13 HEARING OFFICER FAY: Is there --

14 MS. LUCKHARDT: The consultation with
15 the U.S. Fish and Wildlife Service is through EPA,
16 through the PSD permit. And that's the proceeding
17 through which the biological opinion has been
18 requested from the federal agency, in this case
19 EPA. And that is the venue in which it will be
20 received and where it will be addressed.

21 HEARING OFFICER FAY: So it would be
22 comments or any actions on the PSD permit?

23 MS. LUCKHARDT: Correct.

24 HEARING OFFICER FAY: Okay. Did you
25 hear that, --

1 MR. SIMPSON: The PSD permit comment
2 period is scheduled to end in about ten days or 15
3 days. So can we expect the biological opinion
4 before that?

5 MS. LUCKHARDT: We hope so.

6 HEARING OFFICER FAY: I guess nobody
7 here knows.

8 MS. LUCKHARDT: We call them weekly.

9 MR. SIMPSON: But my question is will
10 the CEC be providing public notice of Fish and
11 Wildlife's draft determinations of the PSD permit?

12 HEARING OFFICER FAY: Well, if it
13 changed the conditions of certification published
14 by the CEC then the answer is yes.

15 MR. SIMPSON: Okay. Because, the
16 concern is that you hold yourselves out as the
17 exclusive agency for compiling this information,
18 but now that the PSD permit is proceeding with no
19 notice on the CEC website, with no notice of the
20 workshops, so it's proceeding in relative
21 anonymity after you've drawn the public's
22 attention towards the CEC.

23 So how does the public know to stop
24 looking at the CEC and start looking at the EPA or
25 Fish and Wildlife if you don't provide that

1 notice?

2 HEARING OFFICER FAY: Is there any
3 comment period on the biological opinion, Ms.
4 DeCarlo?

5 MS. LUCKHARDT: No.

6 HEARING OFFICER FAY: Okay.

7 MS. DeCARLO: -- separately. But it's
8 through the PSD permit, EPA has noticed it. It
9 has its own noticing requirements from that
10 process which, I'm sure, it's completely complied
11 with.

12 There's no obligation on the part of the
13 Energy Commission to notice activities that are
14 outside of the Energy Commission's purview. And
15 we have not had a history of noticing federal
16 agency proceedings.

17 We do incorporate federal permits to the
18 extent that they're available during our
19 proceeding. However there are times when such
20 final permits are not available. That does not
21 preclude us from issuing a permit.

22 Generally staff coordinates with the
23 agencies to have an understanding as to what
24 agencies are likely to require, and we've done a
25 fairly good job, have a fairly good history of

1 anticipating the permit requirements and
2 incorporating them in the final decision.

3 HEARING OFFICER FAY: Okay. Well, we're
4 trying to schedule the hearing, Mr. Simpson, and
5 so I think the best you can do is if you have
6 questions ask them of the biological resources
7 witnesses that staff will have available, and
8 possibly any witnesses knowledgeable in that field
9 from the applicant.

10 And beyond that I think you'll just have
11 to make your arguments to the Committee and the
12 Commission in your briefs on the case-in-chief.

13 MR. SIMPSON: I understand we're trying
14 to schedule the hearing here. And the PSD
15 considerations are going on concurrently. The CEC
16 has done the outreach. It's done a composite
17 mailing list that's chosen provided by the EPA or
18 the EPA's notice should be processed through the
19 CEC. It should go one way or the other. You have
20 the interested parties list. If you haven't
21 provided it to the EPA for their considerations,
22 then the public is deceived on which way to go to
23 participate in this proceeding.

24 Your notices say that you've compiled
25 the federal and state requirements that all the

1 agencies can come sit at the table here with you,
2 but when they actually do their considerations
3 you've excluded from your process, and provide no
4 notice.

5 So the proceedings shouldn't continue
6 until such time as you provide notice of the PSD
7 permit, you provide notice of what's going on with
8 Fish and Wildlife.

9 HEARING OFFICER FAY: Okay, we've noted
10 your concern. The next topic that I want to ask
11 about is noise and vibration. And, again, the
12 staff and the applicant have reached
13 understandings on the conditions of certification
14 for this. Any expression of concern from the
15 parties on the line?

16 All right, I don't hear any. And I will
17 note that this project is quite remote from any
18 population centers.

19 Now, transmission system engineering.
20 Again, staff and applicant would not normally have
21 witnesses there. Mr. Simpson, you mentioned a
22 concern in this area before. Do you want to
23 revisit that?

24 MR. SIMPSON: Sure. I think this is
25 what's usually handled by Cal-ISO. And any --

1 apparently applicant had its own consultants
2 conduct this -- proceeding. I would like to
3 examine the witnesses and understand the
4 relationship to the capacity, how development of
5 this facility will interfere with the transmission
6 of renewable resource.

7 So we're filling up the lines with this
8 old style power, how do the renewables get on the
9 grid. There's relationships that haven't been
10 explored, and I'd like to cross-examine the
11 witness.

12 MS. DeCARLO: As part of our line-up for
13 the greenhouse gas emissions testimony we will
14 have David Vidaver of staff. And he, I believe,
15 will be able to speak to the interaction with this
16 facility and greenhouse gas -- or I'm sorry, and
17 renewable facilities and the interaction on the
18 grid.

19 I believe that's a subject matter more
20 to his knowledge rather than TSE staff, who
21 specifically focus on how this project
22 interconnects at the point of interconnection, and
23 not necessarily how it affects the system, per se.

24 HEARING OFFICER FAY: Okay. Did you
25 hear that, Mr. Simpson? It sounds like staff will

1 have a witness there to address your concerns.
2 Although it probably will come up under the
3 discussion of greenhouse gases.

4 MR. SIMPSON: I did hear but I'm not
5 sure who was speaking.

6 HEARING OFFICER FAY: That was Ms.
7 DeCarlo, and she said that the staff witness would
8 be David Vidaver.

9 MR. SIMPSON: Thank you.

10 HEARING OFFICER FAY: I'll just remind
11 the other parties to jump in if there's something
12 you're concerned about.

13 Okay, power plant reliability. Again, I
14 don't anticipate witnesses will be present.
15 Visual resources, same thing. The staff and
16 applicant have reached agreement on the
17 appropriate conditions of certification to reduce
18 impacts from that.

19 Worker safety and fire protection. CRPE
20 voiced concerns about worker safety, but Ms.
21 DeCarlo indicated that they will have a witness
22 who can address mitigation or remediation of any
23 hazards in the soil. Any other concern about
24 worker safety?

25 Okay, land use impacts. Again, we do

1 not anticipate having witnesses present, although
2 project managers can answer general questions
3 regarding the project's compliance with local
4 requirements in land use.

5 Alternatives. Now this has been raised
6 by a couple of the parties. I believe Sierra Club
7 and CRPE showed a lot of interest in this. Is
8 there anything specific that you think might not
9 be addressed by the witnesses who will already be
10 available?

11 MS. BROSTROM: CRPE. I am interested in
12 why -- solar, wind and other renewables are
13 excluded. I'm also interested in why the one
14 facility I believe is further south was excluded
15 in the final staff assessment where it talked
16 briefly about another location and they dismissed
17 it. I didn't believe there was very much
18 justification for that dismissal. So, I'm
19 interested in that.

20 HEARING OFFICER FAY: Okay. I'll ask
21 both the staff and the applicant if they will have
22 witnesses there who can address that type of
23 question.

24 MS. DeCARLO: Well, the witness who
25 authored our alternatives analysis is available to

1 be present. He wouldn't be present in any of
2 these other subject matter areas that we've
3 identified. He can be made available.

4 HEARING OFFICER FAY: But can -- the
5 project manager or some of the other witnesses
6 could not address that?

7 MS. DeCARLO: Probably not the details
8 to what alternatives were, the reasons for
9 excluding certain alternatives. I mean we could
10 have the project manager summarize the analysis,
11 but if there were any detailed questions that went
12 beyond what was written in the FSA, I believe we
13 would want to have the actual witness present.

14 HEARING OFFICER FAY: Can you have that
15 witness?

16 MS. DeCARLO: He's available on that
17 day, Christopher Meyer. Yes, we can make him
18 available.

19 HEARING OFFICER FAY: Does the applicant
20 have anybody who would be able to answer some of
21 these questions as to their --

22 MS. LUCKHARDT: As to our analysis, all
23 of our witnesses are already planning on being
24 down there, so --

25 HEARING OFFICER FAY: Okay.

1 MS. LUCKHARDT: -- our witnesses will be
2 there. Although our alternatives analysis is
3 slightly different from staff's. So if they have
4 questions specifically on some of the alternatives
5 that staff looked at, staff, unfortunately, would
6 have to have their witness available.

7 HEARING OFFICER FAY: Okay. It sounds
8 like, Ms. DeCarlo, you should try to have Mr.
9 Meyer here.

10 MS. DeCARLO: Okay.

11 HEARING OFFICER FAY: Okay, we'll allow
12 time for cross-examination of the staff's
13 alternatives witness. Anything further on
14 alternatives?

15 All right. And we've already discussed
16 greenhouse gas emissions, and there will be a
17 whole complement of witnesses there.

18 So that takes us through all the topic
19 areas. And it looks to me like you can anticipate
20 witnesses being available to describe the project;
21 to address hazardous materials handling; and waste
22 management worker safety issues related to that
23 would have a witness.

24 In addition, of course, witnesses for
25 both staff and applicant on air quality, public

1 health, and greenhouse gases. And biological
2 resources; TSE or transmission system engineering
3 questions would be addressed under greenhouse
4 gases. And there would also be a witness from the
5 staff to address the alternatives analysis.

6 So I think that's what we've concluded.
7 I'll just check with the Presiding Commissioner.
8 You agree? All right.

9 So I think that's what you can count on.
10 And we will get a followup message out to the
11 parties so they have that in writing. And unless
12 there's some other urgent need regarding the topic
13 list, I'd like to move to public comment, because
14 we have some people who have been patiently
15 waiting. Yes.

16 MR. SIMPSON: Yes, Rob Simpson, --

17 MS. DeCARLO: Could I just have a point
18 of clarification for some additional procedural
19 matters?

20 HEARING OFFICER FAY: Certainly.

21 MS. DeCARLO: Mr. Simpson identified two
22 witnesses in his prehearing conference statement.
23 Were those addressed in the response to the -- I'm
24 not sure if applicant included that in their
25 objection to CRPE's witness list. Or if that was

1 included in the Committee's determination as to --

2 HEARING OFFICER FAY: What were those
3 two witnesses?

4 MS. DeCARLO: They're both attorneys,
5 Sanjay Narayan from Sierra Club and Paul R. Cort,
6 -- Justice.

7 HEARING OFFICER FAY: Well, the only
8 testimony of Mr. Simpson's that will be allowed is
9 the one identified as Avenal W.

10 Mr. Simpson, who is the witness on that?

11 MR. SIMPSON: Oh, that was Bob Sarvey.

12 HEARING OFFICER FAY: Well, he's not
13 been identified on your witness list, so it won't
14 be Mr. Sarvey.

15 MR. SIMPSON: Well, my witness list, if
16 you're referring to my prehearing conference
17 statement, I referenced my -- as potential
18 witnesses, if, in fact, they were rejected as my
19 testimony. My prehearing conference statement
20 also identified Sanjay Narayan from Sierra Club
21 and Paul Cort as my witnesses. And that has not
22 been -- I've heard no objection to that. So, are
23 we --

24 MS. DeCARLO: I would voice an objection
25 at this point.

1 HEARING OFFICER FAY: Well, you
2 understand that the whole point is to link the
3 witness with the proposed testimony?

4 MR. SIMPSON: And I did submit comments
5 from both of these individuals in my testimony.
6 So there's extensive, I mean there's three 500-
7 page documents that are attributed to Paul Cort
8 and Sanjay Narayan in my testimony that I linked
9 back in my prehearing conference statement, that
10 it was testimony, that it would be -- these
11 witnesses would present it.

12 MS. DeCARLO: I believe the comments
13 that were the subject of the testimony that were
14 the ones the Committee excluded. They concerned
15 specifically the other power plant --

16 MS. LUCKHARDT: Russell City.

17 MS. DeCARLO: -- no -- Russell City
18 Power Plant. And therefore were not relevant to
19 this proceeding.

20 MS. LUCKHARDT: Yeah, and I mean we
21 haven't come to a hearing or a situation where we
22 would examine whether it's appropriate to have
23 attorneys testify, in any event.

24 But what also was filed were comment
25 letters in another proceeding, not written

1 testimony by these individuals. So we would have
2 concerns about having them testify, or having
3 their comment be considered testimony.

4 And we would also, in general, have
5 concerns about having attorneys testify unless we
6 fully understood what exactly they were testifying
7 to.

8 HEARING OFFICER FAY: Yeah. The
9 Committee agrees with those arguments. And, Mr.
10 Simpson, I think you can presume to be able to
11 present that item W yourself. But the other two
12 people that you listed as witnesses are not agreed
13 to by the Committee. So we'll give you an
14 opportunity to present that discussion of
15 interpollutant trading.

16 MS. DeCARLO: And could I request that
17 Mr. Simpson file a statement of his qualifications
18 and r, sum,. I don't believe such has been filed
19 in this proceeding.

20 HEARING OFFICER FAY: Absolutely. How
21 soon could you get that filed, Mr. Simpson?

22 MR. SIMPSON: Well, I'd like to
23 understand a little more. My prehearing
24 conference statement identifies these witnesses.
25 There's extensive comments attributed to these

1 witnesses in my testimony. There's been no
2 objection until this moment. Why is a new
3 objection overriding the only witnesses that can
4 present anything besides support of this facility?

5 HEARING OFFICER FAY: Well, basically,
6 based on what you filed, it does not link the
7 qualifications of those witnesses to the one
8 statement that we did allow you to introduce. And
9 so what we're saying is that you may introduce it,
10 yourself, but the witnesses that you proposed
11 aren't connected to that statement.

12 The topic will certainly be raised if
13 you choose to bring it up, and be subject to
14 cross-examination on it. Otherwise, you could
15 submit the same thing as public comment, and put
16 it in your arguments. But those are the
17 conditions for presenting it as testimony.

18 MR. SIMPSON: Well, my preconference
19 statement (inaudible) to strike my intervention as
20 testimony. I'd like to reintroduce it as part of
21 my prehearing conference statement.

22 And regarding these witnesses, I have
23 got the same verbiage in here that says if it's
24 not testimony then -- it is not my testimony, then
25 you should allow the parties who (inaudible) the

1 documents to testify.

2 And I don't understand the basis for a
3 decision that allows no one to testify except
4 who's testifying in favor of the project.

5 HEARING OFFICER FAY: Well, Mr. Simpson,
6 you chose to wait until the last possible day to
7 intervene in this case. And perhaps you were not
8 familiar with all the processes that we normally
9 use to introduce formal testimony.

10 It is rather specific, because, of
11 course, anybody can offer public comment and that
12 is considered by the Committee in drafting the
13 decision. But you want to participate as a party
14 and introduce formal testimony, then we've got to
15 have it prefiled and we've got to be able to
16 identify the witnesses so that the parties don't
17 have any surprise.

18 And I've laid out the conditions of
19 that. The Committee has ruled against your two
20 witnesses. But we have offered you the
21 opportunity to offer this as your testimony, if
22 you wish. So that's the order of the day.

23 I think we've heard argument from all
24 the parties on this matter.

25 What I would like to do is move now, ask

1 if there's any public comment from people that
2 have been listening in. I've got a lot of names
3 of folks who are on the line listening, but it
4 looks like none of them have asked to make public
5 comment. Is there anybody who wants to make some
6 comment now before we adjourn?

7 Okay, I'm not hearing any expression, so
8 I assume there's no further comment from anybody
9 listening.

10 The Presiding Member, Commissioner
11 Byron, would like to make a comment.

12 PRESIDING MEMBER BYRON: Yeah, I'd like
13 to thank all the parties for their patience. I've
14 not sat through a three-hour prehearing conference
15 before, myself.

16 I'd like to also make sure that we all
17 recognize that there are staff limitations as a
18 result of the furloughs that the state employees
19 are being subjected to. And, in fact, I believe
20 this being the last day that a budget is due from
21 our legislature. Tomorrow marks the day when some
22 of us are not to be paid for our occupations here
23 working for the state.

24 I'd like to ask and make sure that all
25 parties are going to be familiar with the process

1 and procedures of this Commission when we conduct
2 the evidentiary hearing next week.

3 The Committee's interested in all
4 relevant evidence that leads us towards a
5 decision, but not in those delays and procedural
6 obfuscations that slow things down. We want to
7 complete this evidentiary hearing next week.

8 And I'd like to ask the staff to make
9 sure that you think through having the appropriate
10 experts there for cross-examination so that we
11 don't find ourselves in a situation where we're
12 going to have to have an additional evidentiary
13 hearing date.

14 Thank you all for being here.

15 HEARING OFFICER FAY: Thank you. We are
16 adjourned.

17 (Whereupon, at 11:57 a.m., the
18 prehearing conference was adjourned.)

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CERTIFICATE OF REPORTER

I, JOHN COTA, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Prehearing Conference; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of July, 2009.

John Cota

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

July 6, 2009

Margo D. Hewitt

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